Supreme Court, U.S.
FILED

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No._____

In The
Supreme Court of the United States
October Term, 1996

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLEVELAND, OKLAHOMA, ET AL.,

Petitioners,

v.

JERRY SHINAULT,

Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## PETITION FOR WRIT OF CERTIORARI

## I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit has correctly interpreted Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), as depriving the court of jurisdiction to review de novo whether the plaintiff has sustained his initial burden of proof of motivation pursuant to Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), because the trial court found that motive was a material question of fact in plaintiff's First Amendment retaliation claim. That is, where the trial court has found that the issue of motive is a disputed question of material fact, is the Tenth Circuit, under Johnson v. Jones, deprived of jurisdiction to review that finding as a matter of law, or is such a result by either court below a vast departure from the accepted and usual course of judicial proceedings which are required by Mt. Healthy and Harlow, so as to call for an

exercise of this Court's supervisory power? Sup. Ct. R. 10.

2. Whether the Tenth Circuit Court of Appeals erred in finding it lacked jurisdiction over George Skinner's qualified immunity appeal of questions of law, because the trial court found that the issue of motive is a disputed question of material fact, thereby entering a decision in conflict with the decisions of various United States courts of appeals on the issue of the appealability of orders denying claims of qualified immunity pursuant to Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). Sup. Ct. R. 10.

## II. PARTIES TO THE PROCEEDING

Parties to the proceeding in the Tenth Circuit were as follows:

**Jerry Shinault**, Appellee/Cross Appellant (Respondent herein)

vs.

**Board of County Commissioners of the County of Cleveland, a Political Subdivision of the State of Oklahoma; George Skinner, Leroy Krohmer and Jan Collins**, County Commissioners as public officers in their official capacities[1]; and George Skinner, in his individual capacity, Appellants/Cross-Appellees (Petitioners herein).

There are no parent companies or nonwholly owned subsidiaries of the parties.

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[1]The claims against Krohmer and Collins, and against Skinner in his official capacity, are in reality claims against Cleveland County, see Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and the District Court so treated them. (App. 1.) This brief generally refers only to the two real defendants/petitioners: Cleveland County and George Skinner.

## III. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

### TABLE OF CONTENTS

I. Questions Presented for Review ..... i

II. Parties to the Proceeding ..... iii

III. Table of Contents and Table of Cited Authorities ..... iv

IV. Verbatim Citations ..... x

V. Citations of Reports of Opinions Entered in this Case ..... x

VI. Basis for Jurisdiction of the Court ..... x

VII. Statement of the Case ..... 1

A. Procedural posture of the case including basis for federal jurisdiction of district court ..... 1

B. Facts material to consideration of the questions presented ..... 3

VIII. Argument in Support of the Allowance of the Writ ..... 8

PROPOSITION I:

THE TENTH CIRCUIT, RELYING ON JOHNSON V. JONES TO FIND IT LACKED JURISDICTION OVER SKINNER'S

APPEAL OF DENIAL OF HIS CLAIM OF QUALIFIED IMMUNITY, HAS CONSTRUED JOHNSON V. JONES AS OVERRULING MT. HEALTHY CITY SCHOOL DISTRICT V. DOYLE. MT. HEALTHY HELD THAT A PLAINTIFF MUST, AS A MATTER OF LAW, SUSTAIN AN INITIAL BURDEN OF PROOF OF CAUSATION TO OVERCOME A DEFENDANT'S CLAIM OF QUALIFIED IMMUNITY. SUCH A CONSTRUCTION OF JOHNSON CONSTITUTES ERROR AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER ..... 8

A. Summary of argument ..... 9

B. Analysis of qualified immunity claims in First Amendment retaliation cases ..... 15

C. Skinner's position in the circuit court of appeals ..... 18

D. Appellate review of questions of law in qualified immunity cases is a valuable and well-established right, the wholesale denial of which is a vast departure from the accepted and usual course of judicial proceedings ..... 21

PROPOSITION II:

THE TENTH CIRCUIT'S REFUSAL TO EXERCISE JURISDICTION OVER SKINNER'S APPEAL OF DENIAL OF QUALIFIED IMMUNITY, AND ITS EMASCULATION OF THE RULE OF MT. HEALTHY, IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER, AND THEREBY DEPRIVES THE PUBLIC AND PUBLIC OFFICIALS AND EMPLOYEES SERVING WITHIN THE JURISDICTION OF THE TENTH CIRCUIT COURT OF APPEALS OF THE BENEFITS OF QUALIFIED IMMUNITY WHICH ARE AVAILABLE TO PERSONS IN OTHER JURISDICTIONS . . . . . 23

A. The appealability of a denial of qualified immunity under Behrens . . . . . 24

B. The Fifth, Seventh, Eighth and Eleventh Circuit courts of appeals have recognized their continued jurisdiction under Behrens to entertain qualified immunity appeals which turn on questions of law, regardless of whether there exist facts in dispute . . . . . 26

SUMMARY . . . . . 30

## TABLE OF CITED AUTHORITIES

**Cases:**

Abney v. United States,
431 U.S. 651, 97 S.Ct. 2034,
52 L.Ed.2d 651 (1977) ..... 23

Beauregard v. Olson,
84 F.3d 1402 (11th Cir. 1996) ..... 27

Behrens v. Pelletier,
___ U.S. ___, 116 S.Ct. 834,
133 L.Ed.2d 773 (1996) ..... i, ii, 9, 10, 13 - 18,
..... 20 - 26, 28 - 30

Cantu v. Rocha,
77 F.3d 795 (5th Cir.1996) ..... 26

Clash v. Beatty,
77 F.3d 1045 (7th Cir. 1996) ..... 28

Cottrell v. Caldwell,
85 F.3d 1480 (11th Cir. 1996) ..... 28

Harlow v. Fitzgerald,
457 U.S. 800, 102 S.Ct. 2727,
73 L.Ed.2d 396 (1982) ..... i, 3, 16, 18, 21

Heidemann v. Rother,
84 F.3d 1021 (8th Cir. 1996) ..... 28

Jemmott v. Coughlin,
85 F.3d 61 (2nd Cir. 1996) ..... 27

Johnson v. Jones,
___ U.S. ___, 115 S.Ct. 2151,
132 L.Ed.2d 238 (1995) ..... i, ii, 9 - 15, 17,
..... 18, 20, 22-26,
..... 28, 29

Kentucky v. Graham,
473 U.S. 159, 105 S.Ct. 3099,
87 L.Ed.2d 114 (1985) ..... iii

Mitchell v. Forsyth,
472 U.S. 511, 105 S.Ct. 2806,
86 L.Ed.2d 411 (1985) ..... 9, 22, 23, 30

Mt. Healthy City School District v. Doyle,
429 U.S. 274, 97 S.Ct. 568,
50 L.Ed.2d 471 (1977) ..... i, 2, 12 - 18
..... 21 - 24, 30

Shinault v. Cleveland County Bd.
of County Com'rs,
82 F.3d 367 (10th Cir. 1996) ..... 1

Stack v. Boyle,
342 U.S. 1, 72 S.Ct. 1,
96 L.Ed 1 (1952) ..... 22

Swint v. Chambers County Commission,
___ U.S. ___, 115 S.Ct. 1203,
131 L.Ed.2d 60 (1995) ..... 3

**Statutes:**

28 U.S.C. §1254 ..... 1

28 U.S.C. §1331 ..... 1

28 U.S.C. §2101 ..... 1

42 U.S.C. §1985 ..... 2

Okla.Stat.tit. 19, § 215.5 ..... ix, 6

**Miscellaneous:**

Rule 10 of the Rules of the Supreme Court ..... i, ii, ..... 15, 23

Rule 29.4 of the Rules of the Supreme Court ..... 1

## IV. VERBATIM CITATIONS

Title 19 O.S. §215.5

The District Attorney or his assistants shall give opinion and advice to the board of county commissioners and other civil officers of his counties when requested by such officers and boards, upon all matters in which any of the counties of his district are interested, or relating to the duties of such boards or officers in which the state or counties may have an interest.

## V. CITATIONS OF REPORTS OF OPINIONS ENTERED IN THIS CASE

Shinault v. Cleveland County Bd. of County Com'rs, 82 F.3d 367 (10th Cir. 1996).

## VI. BASIS FOR JURISDICTION OF THE COURT

(i) Petitioners seek review of the judgment of the Tenth Circuit Court of Appeals entered on April 26, 1996 (App. 1-10).

(ii) Rehearing was denied by the court of appeals on May 30, 1996 (App. 52-53).

(iii) Petitioners rely upon 28 U.S.C. §§1254(1) and 2101(c) to confer on this Court jurisdiction to review the decision of the Court of Appeals on writ of certiorari.

(iv) No notifications are required by Rule 29.4(b) or (c) of the Rules of the Supreme Court.

## VII. STATEMENT OF THE CASE

A. Procedural posture of the case including basis for federal jurisdiction of district court.

Pursuant to 28 U.S.C. §1331, a district court has original jurisdiction over any civil action arising under the Constitution or laws of the United States. Respondent Jerry Shinault filed this action

in federal district court, alleging that petitioners, Board of County Commissioners of Cleveland County ("Cleveland County"), George Skinner, Leroy Krohmer and Jan Collins violated the Fourteenth Amendment by depriving him of liberty and property without due process, and denied him First Amendment association rights. Only Skinner was sued individually. Shinault also brought claims of conspiracy under 42 U.S.C. §1985, and pendent state law claims for malicious prosecution, defamation and the infliction of emotional distress.

On August 25, 1994, the district court granted summary judgment to all defendants on all claims except those under the First Amendment, and denied Skinner's qualified immunity claim. (App. 11-51.) Skinner appealed the trial court's denial of qualified immunity, asserting that as a matter of law Shinault did not establish:

(1) that protected conduct occurred; or

(2) that protected conduct was a motivating factor in Skinner's decision to terminate Shinault's employment, both pursuant to Mt. Healthy City

School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), or

(3) that Skinner violated clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

(App. 54-99.) Pursuant to the pendent appellate jurisdiction doctrine, Swint v. Chambers County Commission, ___ U.S. ___, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995), all defendants appealed the denial of summary judgment on the First Amendment. Shinault cross-appealed the grant of summary judgment on his due process, equal protection, and federal conspiracy claims. (App. 100-131.)

B. Facts material to consideration of the questions presented.

This case arises out of the termination of employment of respondent, Jerry Shinault, from his position as Cleveland County, Oklahoma, District 2 road foreman. The chronology of events and material facts before the district court were for the most part not in dispute. (App. 72-78, 103-114). In any event, it was Skinner's

position in the Tenth Circuit that looking at the evidence in the light most favorable to Shinault, under the facts as found by the trial court, Skinner was entitled to qualified immunity as a matter of law. (App. 58, 64, 89-93.)

From 1986 until 1990, Shinault was an employee of Cleveland County District 3. (App. 12.) In 1990, he ran for the position of County Commissioner for Cleveland County District 2, losing in a three-way Democratic primary. Skinner, who won the Democratic primary, was ultimately elected the District 2 County Commissioner and took office at the beginning of 1991. (App. 20.)

After Skinner assumed office, he hired Shinault as the District 2 road foreman, which is essentially the top unelected position in the district. Shinault left his job with District 3 and began his new job, in District 2, in January, 1991. This was the first job Shinault had ever held with District 2, and constituted a significant promotion and pay raise over Shinault's previous job with the District 3 Commissioner. (App. 72-74, 103-4.)

It was undisputed, and the trial court so found, that in July,

1991, Skinner held a meeting with Shinault to discuss rumors Skinner had heard that District 2 employees were using county equipment on private property without authorization. Skinner and Shinault discussed the fact that it was improper for a county employee to use county equipment, funds or materials on private property. The next day, Skinner met with all District 2 employees, including Shinault, and again stated that it was improper and unlawful for a county employee to use county equipment, funds or materials on private property. (App. 13.)

A few weeks later, on August 25, 1991, Skinner received a telephone call from Leroy Krohmer, District 3 County Commissioner. Krohmer told Skinner that he had received telephone calls from two citizens complaining that the driveway of a county employee who lived in District 2 had been oiled and chipped with county equipment. At that time, employees of District 2 had just completed an oil and chip paving project for the Little Axe School District. (App. 13-14.)

Skinner and Krohmer drove by the Little Axe project and discovered that the driveway of James Bruesch, a county employee,

had been freshly oiled and chipped. Bruesch's driveway lies within District 2. After observing the site, Skinner contacted his son-in-law and personal attorney, Blake Virgin, to discuss the matter. Shinault and Virgin then held a meeting with Skinner at which Skinner admitted he was aware that county employees oiled and chipped Bruesch's driveway with county equipment, and stated that he had even been present during at least part of the project. (App. 14.)

The next day, August 26, 1991, Skinner reported his findings to the Cleveland County District Attorney's office. (App. 15.) By law, the District Attorney is the County Commission's legal adviser. Okla.Stat.tit. 19, § 215.5 (1991). The Cleveland County District Attorney's office instituted an investigation of Shinault and other employees involved in the driveway incident. A district attorney's investigator met with several county employees who had been present during the incident, and with the school district officials responsible for the Little Axe project. The employees stated that they knew use of the county equipment on Bruesch's driveway was a violation of county policy, but they were afraid either to object or to refuse to

participate in the oiling and chipping of Bruesch's driveway. (App. 15-16, 76-77, 108-12.)

The investigator also interviewed Bruesch, who admitted that he had allowed county employees to use county equipment to oil and chip his driveway. Furthermore, he interviewed Shinault, who admitted that he had been present, and stated that he did not stop his employees from applying the oil and chip to Bruesch's driveway. (App. 6.)

The District Attorney advised Skinner that it was appropriate to terminate Shinault's employment because of his participation in the misuse of county equipment (App. 77, 113). Shinault's employment was then terminated in September 1991. (App. 15.) Skinner also disciplined Bruesch, by suspending him without pay. Another employee received a severe reprimand. (App. 77-78, 113.)

On November 7, 1991, the State of Oklahoma filed criminal complaints against Shinault and Bruesch. On February 4, 1992, Bruesch pleaded guilty to a misdemeanor charge of misusing county equipment. Shinault pleaded not guilty to a charge of embezzlement,

and was tried before a jury. On May 20, 1992, the jury found Shinault not guilty. (App. 16-17.)

The trial court found, and it was uncontested, that prior to the 1986 election, Shinault and County Commissioner Leroy Krohmer (named as a defendant in his official capacity only) had been close friends. After Krohmer, who was District 3 County Commissioner prior to 1986, was defeated for reelection in 1986, Shinault informed Krohmer that he had agreed to go to work for Steely, the District 3 Commissioner who defeated Krohmer. Krohmer became upset because he thought Shinault had worked against him in the 1986 County Commissioner's race. Shinault and Krohmer have not been friends since that time. (App. 21.) While many of the facts relied upon by Shinault in his lawsuit relate to the animosity between Shinault and Krohmer, who was restored to his seat as County Commissioner by the 1990 election, it was Skinner, not Krohmer, who had the right to hire and fire District 2 employees.

## VIII. ARGUMENT IN SUPPORT OF THE ALLOWANCE OF THE WRIT

### PROPOSITION I:

**THE TENTH CIRCUIT, RELYING ON JOHNSON V. JONES TO FIND IT LACKED JURISDICTION OVER SKINNER'S APPEAL OF DENIAL OF HIS CLAIM OF QUALIFIED IMMUNITY, HAS CONSTRUED JOHNSON V. JONES AS OVERRULING MT. HEALTHY CITY SCHOOL DISTRICT V. DOYLE. MT. HEALTHY HELD THAT A PLAINTIFF MUST, AS A MATTER OF LAW, SUSTAIN AN INITIAL BURDEN OF PROOF OF CAUSATION TO OVERCOME A DEFENDANT'S CLAIM OF QUALIFIED IMMUNITY.**

**SUCH A CONSTRUCTION OF JOHNSON CONSTITUTES ERROR AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.**

A. Summary of argument.

Oral argument in this matter, before a three-judge panel of the Tenth Circuit Court of Appeals, was held on March 5, 1996, approximately 13 days after this Court's decision in Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). The decision in Behrens, discussed in oral argument at length by counsel for Skinner, reaffirmed already well-established precedent that a district court order denying qualified immunity, to the extent it turns on an abstract question of law, is immediately appealable. See also, Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411

(1985).

The Tenth Circuit decision ignored Behrens, and relied solely on Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), to find it lacked jurisdiction of Skinner's appeal. Saying that "the district court found that a genuine issue of material fact existed as to whether Skinner fired Shinault for engaging in constitutionally protected political activities," the court ruled that "under Johnson, that finding is unreviewable." (App. 9.)

The circuit court continued:

> Skinner counters that, under Johnson, we should take the facts assumed by the district court as given and determine whether those facts state a violation of clearly established law. Skinner spends most of his brief on the jurisdiction question[2] arguing that the undisputed facts on the record do not give rise to a nexus between Shinault's political activities and this dismissal. But the relevant "assumed fact" is that Skinner fired Shinault for political patronage reasons, and Skinner does not contest the purely legal holdings

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[2]In response to a Tenth Circuit Order issued on August 3, 1995, the parties separately briefed the issue of jurisdiction in light of Johnson v. Jones. Petitioners urged in that brief, as in their principal appeal brief, that "[a]ll that this appeal asks the court to do is to assume the facts that the trial court assumed, and to determine whether those facts state a violation of clearly established law." (App. 57-58.)

> that such an action violates Shinault's First Amendment right of association or that such a right was clearly established at the time of the termination. Skinner contests the district court's factual determination, and thus we are without jurisdiction to review his appeal.

(App. 9-10.)

In Johnson, the district court order being appealed resolved the "fact-related dispute" about "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial[,]" (115 S. Ct. 2153, some emphasis in original). The crux of Skinner's appeal, on the other hand, was whether the trial court erred in relying on the mere existence of a fact-related dispute to deny qualified immunity. Skinner's position was that under the facts assumed by the trial court, he was entitled to qualified immunity. (App. 57-64, 81-93.) That issue is purely a matter of law.

The Tenth Circuit, in its explicit application of Johnson to Skinner's appeal, broadly--and literally--applied Johnson's limitations on jurisdiction of qualified immunity appeals. Its order denying Skinner's appeal reasoned: "Indeed, an examination of Skinner's motivation for firing Shinault is just the sort of nebulous factual

assessment that Johnson leaves to the district courts. See Johnson, 115 S. Ct. at 2158." (App. 9, emphasis added.) The language in Johnson to which the circuit court apparently referred was that: "Many constitutional tort cases, unlike the simple 'we didn't do it' case before us, involve factual controversies about, for example, intent--controversies that, before trial, may seem nebulous." Id.

While this dictum in Johnson may certainly apply in some contexts, the Tenth Circuit has now construed it to foreclose appellate jurisdiction in First Amendment retaliation cases--cases where motive is highly likely to be an issue in dispute. Such an interpretation necessarily assumes that Johnson has by implication overruled previous case law which required an examination of whether the plaintiff's proffered proof is sufficient, as a matter of law, to sustain his initial burden of proof of a motivating factor, in qualified immunity appeals arising from a First Amendment retaliation claim. See Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977), and discussion at Proposition I, Part B, infra.

The Tenth Circuit's implicit rejection of Behrens' application to Skinner's appeal, by virtue of the glaring omission of any discussion of Behrens in the circuit court's decision, is further evidence that court interprets Johnson to foreclose jurisdiction over a qualified immunity appeal raising a Mt.Healthy causation or motivation issue. This is perhaps because this Court in Behrens, although giving short shrift to the contention Johnson precluded Behrens' appeal, noted that "typically, the issue [on appeal] is whether the federal right allegedly infringed was 'clearly established[.]'" Behrens, 116 S. Ct. at 842. In this case, the Tenth Circuit's order relies heavily on the fact that Skinner did not assert that the right to run for political office is not clearly established, or that an employee of the county could not be fired solely for that reason.[3] Those issues, however, were entirely beside the point.

The essence of the Tenth Circuit's ruling is that by virtue of

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[3]Skinner did argue on appeal that it is not clearly established that a public official cannot terminate an employee for violating county policy and for misusing county property; for one-year-old protected conduct which has no nexus to the termination; or for conduct occurring prior to being employed or promoted. (App. 92-93.)

the decision in Johnson, and despite Behrens, when the trial court decision rests upon a genuine issue of material fact as to motive in a First Amendment retaliation claim, the circuit court must take such a finding at face value, and may no longer exercise jurisdiction to examine de novo whether as a matter of law the plaintiff has met his burden of proof under Mt. Healthy. See discussion at Proposition I, Part B, infra.

Leaving aside whether the Tenth Circuit's application of Johnson was correct, Behrens should have served to clarify the law so as to lead the court to a different conclusion and bring it in line with other circuits' applications of Johnson to jurisdictional questions involving appeals of denials of qualified immunity. (See Proposition II, infra.) But even under the narrowest reading of the Tenth Circuit's opinion, public officials and employees serving within that circuit who seek appellate review of questions of law relating to qualified immunity in First Amendment retaliation cases will be denied the right of review whenever a district court finds merely that there is a dispute as to the motive for the adverse employment decision. Under

its broadest reading, giving the decision its full effect, the Mt. Healthy legal analysis of motive or causation is no longer required by the district court in this circuit. Neither Johnson nor Behrens calls for such an interpretation. The Tenth Circuit's denial of the right to appellate review thereby sanctions the trial court's erroneous ruling, and constitutes a vast departure by both courts from the accepted and usual course of judicial proceedings. Sup. Ct. R. 10.

B. Analysis of qualified immunity claims in First Amendment retaliation cases.

This Court's decision in Mt. Healthy established that in a First Amendment retaliation claim the plaintiff carries a heavy initial burden to show both (1) that he engaged in constitutionally protected conduct and (2) causation, that is, that the conduct was a substantial or motivating factor in his termination. On appeal the circuit court must determine, de novo, whether the plaintiff has carried this initial burden. If so, the appellate court must then go on to determine whether the defendant claiming qualified immunity has shown by a preponderance of the evidence that he would have reached the same

decision even absent the protected conduct. Mt. Healthy, 429 U.S. at 287. "Bare allegations of malice should not suffice[.]" Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Rather, the test must focus on "the objective legal reasonableness" of an official's acts. Insubstantial suits should not be allowed to proceed to trial. Harlow, 457 U.S at 818.

The essence of Skinner's position on appeal was that the trial court confused the distinction in qualified immunity cases between the factual dispute as to motive, and the legal dispute as to the conclusion to be drawn as a matter of law from the plaintiff's proffered proof of motive. This is precisely the problem recognized in Behrens when this Court, noting that the denial of summary judgment will always rest on a determination that there are controverted issues of material fact, 116 S.Ct. at 842, nevertheless reiterated the right to appeal the legal conclusions which a district court, whether directly or by implication, also resolves in denying summary judgment.

Denial of summary judgment in a First Amendment retaliation case merely because motive is disputed is precisely the result the Mt.

Healthy Court sought to avoid:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.

429 U.S. at 286. Nothing within the rule of Mt. Healthy was changed by Johnson, as Behrens makes clear. Nevertheless, under the Tenth Circuit's approach in this case, every employee who can offer proof he or she has ever exercised constitutionally protected conduct--even prior to employment, as here--can claim that alleged protected conduct supplied the motive for an adverse employment decision, and the hapless employer who denies it will ipso facto lose his claim to qualified immunity. The district court's confusion about the difference between the requirement that a plaintiff offer facts in proof of causation (which will always be disputed by the defendant when the case turns on questions of motive), and the legal conclusion to be drawn from those facts--their objective legal reasonableness--has now been sanctioned by the Tenth Circuit. As a result, the Mt. Healthy requirement that a plaintiff, as a matter of law, must sustain his initial

burden of proof, has been entirely abandoned in the circuit, under the auspices of Johnson.

The legal analysis long required by this Court in First Amendment retaliation claims is that the protected conduct was a motivating factor in the adverse employment decision, Mt. Healthy, 429 U.S. at 287, and/or that the defendant violated clearly established statutory or constitutional rights of which a reasonable person would have known. Behrens, Harlow v. Fitzgerald. Skinner and all other public officials within the jurisdiction of the Tenth Circuit are entitled to a meaningful appellate review of whether the trial court, as a matter of law, properly made those analyses. The Tenth Circuit's erroneous finding that it lacked jurisdiction to consider those issues under Johnson, based solely upon the district court's statement that a material question of fact exists on the issue of motive, has not only completely foreclosed Skinner's right to appeal the denial of his claim of qualified immunity, but has eliminated the plaintiff's initial burden of proof previously required as a matter of law under Mt. Healthy.

C. Skinner's position in the circuit court of appeals.

The district court found that the protected activity at issue in this case consisted of Shinault's "running against Defendant Skinner in the 1990 Democratic primary [and] Shinault's prior support of Neil Steely, who was defendant Krohmer's political opponent in the 1986 and 1990 elections." These events occurred prior to Shinault's employment by Skinner in 1991. (App. 32-33.)

The legal conclusions to be drawn from this undisputed evidence in connection with Shinault's First Amendment retaliation claim were the crux of Skinner's primary argument on appeal that as a matter of law he is entitled to qualified immunity. The Tenth Circuit clearly understood that Skinner's position on appeal was that the factual dispute over the reason for termination of Shinault's employment is immaterial to the issue of whether the district court erred in denying Skinner qualified immunity--a question of law. (App. 9-10.) Skinner urged that under Shinault's facts as found by the trial court, Shinault did not establish that protected conduct occurred, that it was a motivating factor in Skinner's decision to terminate Shinault's employment, or that Skinner violated clearly established

statutory or constitutional rights of which a reasonable person would have known. (App. 81-93.)

In denying jurisdiction, the circuit court's decision specifically acknowledged that Skinner's argument on appeal was "that the undisputed facts on the record do not give rise to a nexus between Shinault's political activities and his dismissal." (App. 10.) The court explicitly recognized that Skinner's contention was that under Johnson, the appeals court "should take the facts assumed by the district court as given and determine whether those facts state a violation of clearly established law." Id. This is exactly the type of appeal for which jurisdiction was found by this Court in Behrens.

Nevertheless, the Tenth Circuit refused to undertake any legal analysis of Skinner's claims. Instead, citing Johnson's reference to "motive" as an example of nebulous issues for the trial court, and the "magic words" in the district court's decision (that a genuine issue of material fact existed with respect to motive), the Tenth Circuit found it lacked jurisdiction to hear Skinner's appeal of the legal issues he raised. (App. 9.) The effect of the circuit court's decision is to

relieve plaintiffs within that circuit from the obligation to do more than allege or offer proof of some prior act of protected activity, and to return this circuit to the days before Mt. Healthy.

D. Appellate review of questions of law in qualified immunity cases is a valuable and well-established right, the wholesale denial of which is a vast departure from the accepted and usual course of judicial proceedings.

The defense of qualified immunity benefits not only the public official who claims it, but the public at large, who must finance the litigation, and whose public officials will be distracted from their governmental duties, inhibited in their discretionary actions, and perhaps deterred altogether from public service. Harlow, 457 U.S. at 816. It is a "**right** to immunity from certain claims;" and "when immunity with respect to those claims has been finally denied, appeal must be available." Behrens, 116 S. Ct. at 841 (emphasis added). Just as appealability "cannot be foreclosed by the mere addition of other claims to the suit," id., it must not be foreclosed merely because the district court makes a finding that a question of fact exists on the

issue of causation. Behrens, Mt. Healthy, Johnson.

In Behrens, this Court described the possible loss of the right of appeal from potentially erroneous adverse rulings on claims of qualified immunity as "intolerable." 116 S.Ct. at 842. Thus, in rejecting the respondent's position in Behrens, that appeal should not be available if other claims would still require trial, the Court said:

> If the district court rules erroneously, the qualified-immunity right not to be subjected to pretrial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it up) violation of one "clearly established" right[.]

Id. Likewise, if a district court in this circuit rules, however erroneously, that questions of material fact exist on the issue of motive, the Tenth Circuit's interpretation of Johnson, which forecloses appeal, emasculating Mt. Healthy in the process, is intolerable. Like other collateral orders, unless such a decision "can be reviewed before the proceedings terminate, it can never be reviewed at all." See Mitchell v. Forsyth, 472 U.S. at 525, quoting Stack v. Boyle, 342 U.S. 1, 12, 72 S.Ct. 1, 7, 96 L.Ed 1 (1952). Such a right cannot be effectively vindicated after the trial has occurred.

Mitchell v. Forsyth, 472 U.S. at 525, citing Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d at 651 (1977).

The denial of this well-established and valuable right to appeal, coupled with the Tenth Circuit's implicit finding that the Mt. Healthy initial burden of proof of causation is no longer good law, clearly constitutes a vast departure from the accepted and usual course of judicial proceedings. The cost of such a result to both the public and public officials is incalculable. It wholly defeats the public policy reasons underlying the recognition of the qualified immunity defense, denying public officials their "entitlement not to stand trial or face the other burdens of litigation[.]" Mitchell, 472 U.S. at 526. This Court should exercise its supervisory power to require the Tenth Circuit to assume jurisdiction of Skinner's qualified immunity appeal in light of Johnson, Behrens, and Mt. Healthy. Sup. Ct. R. 10(a).

## PROPOSITION II:

## THE TENTH CIRCUIT'S REFUSAL TO EXERCISE JURISDICTION OVER SKINNER'S APPEAL OF DENIAL OF QUALIFIED IMMUNITY, AND ITS EMASCULATION OF THE RULE OF MT. HEALTHY, IS IN CONFLICT

**WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER, AND THEREBY DEPRIVES THE PUBLIC AND PUBLIC OFFICIALS AND EMPLOYEES SERVING WITHIN THE JURISDICTION OF THE TENTH CIRCUIT COURT OF APPEALS OF THE BENEFITS OF QUALIFIED IMMUNITY WHICH ARE AVAILABLE TO PERSONS IN OTHER JURISDICTIONS.**

The Tenth Circuit's refusal to find jurisdiction to review questions of law, whether in the context of Mt. Healthy (see Proposition I, supra) or otherwise, is contrary to the decisions of courts of appeals in other jurisdictions, and represents a split among the circuits.

A. The appealability of a denial of qualified immunity under Behrens.

In Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), this Court considered "the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determine[d] only a question of 'evidence sufficiency[.]'" 115 S.Ct. at 2153. That kind of order was not appealable, the Court concluded, stating at the end of the opinion that "a defendant, entitled to invoke a qualified-immunity

defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 115 S.Ct. at 2159.

Relying on Johnson, the Respondent in Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), argued, inter alia, that Behrens' "appeal of a denial of his summary judgment motion was not available because the denial rested on the ground that '[m]aterial issues of fact remain.'" 116 S.Ct. at 842. The Court in Behrens explicitly rejected that interpretation of Johnson, noting that "[e]very denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact[.]" Behrens, 116 S.Ct at 842, emphasis in original. Johnson, the Court said, held simply that "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." The Court went on to say that Johnson "reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity[.]"

Behrens, 116 S.Ct. at 842, emphasis in original.

The Tenth Circuit's obligation, under Johnson and Behrens, to assume jurisdiction to review Skinner's First Amendment appeal on questions of law, would seem to be unmistakably clear.

B. The Fifth, Seventh, Eighth and Eleventh Circuit Courts have recognized their continued jurisdiction under Behrens to entertain qualified immunity appeals which turn on questions of law, regardless of whether there exist facts in dispute.

In Cantu v. Rocha, 77 F.3d 795 (5th Cir. 1996), decided February 28, 1996, the Fifth Circuit was asked to review the denial of both state and federal qualified immunity claims of the three defendants. Although material facts were in dispute, the court recognized as a matter of federal law that it had jurisdiction to hear the appeal:

> Although Ethridge squarely denies the conduct alleged by Cantu, his qualified immunity defense does not present the sort of "evidence sufficiency" point held not to be appealable in Johnson.
>
> . . . .
>
> In this case, review of Ethridge's assertion on appeal

> would not require this court to decide, on the basis of a limited record, a disputed factual issue that may well be resolved at trial, i.e., whether Ethridge engaged in the acts of which he was accused. The court simply must decide whether, under the facts as alleged by Cantu, Ethridge is entitled to qualified immunity under Texas state law.

77 F.3d at 805 (emphasis added).

Similarly, in Jemmott v. Coughlin, 85 F.3d 61 (2nd Cir. 1996), decided May 23, 1996, the defendants' motion for summary judgment on the ground of qualified immunity was denied by the district court because "plaintiff has raised questions of fact as to the defendants' actions and intent[.]" 85 F.3d at 66. For purposes of appeal, however, the Second Circuit found it had jurisdiction to review the district court's rejection of the defendants' argument that even if the plaintiff's allegations are accepted as true, no clearly established constitutional right was violated.

The Eleventh Circuit has also recognized that the right to appeal questions of law despite disputed facts, remains intact. See Beauregard v. Olson, 84 F.3d 1402 (11th Cir. 1996), decided June 12, 1996 ("In its order denying Olson immunity, the district court wrote

only that 'it is clear that genuine issues of material fact remain to be resolved[.]'. . . .For purposes of our review we accept as true both that Plaintiffs' job duties were ministerial and that Olson fired them for political reasons. Even so, Olson says he is entitled to qualified immunity. So, we have jurisdiction[,]" [citing Behrens v. Pelletier]). See also Cottrell v. Caldwell, 85 F.3d 1480 (11th Cir. 1996), decided June 3, 1996 ("[A]s clarified by Behrens, Johnson does not affect our interlocutory jurisdiction in qualified immunity cases where the denial is based even in part on a disputed issue of law.")

The Seventh Circuit, in Clash v. Beatty, 77 F.3d 1045 (7th Cir. 1996), affirming the trial court's order denying summary judgment based on a qualified immunity defense, has also correctly applied both Johnson and Behrens in its analysis of the trial court's decision. After a discussion of the two cases, the court found that it "lack[ed] the 'given facts' that either do or do not show a violation of 'clearly established law.'" Clash, 77 F.3d at 1048.

See also, Heidemann v. Rother, 84 F.3d 1021, 1027 (8th Cir. 1996), decided May 23, 1996 ("In rejecting defendants' qualified

immunity claim. . .the district court stated, without further explanation, that 'factual disputes exist in this action such that genuine issues of material fact remain for trial.' We, therefore, find it necessary to review the record and consider the legal context of plaintiffs' constitutional and statutory claims, in order to determine whether this interlocutory appeal raises abstract issues of law relating to qualified immunity over which we presently have jurisdiction. We hold that it does.")

In contrast, in the instant case thetrial court, finding Skinner denied the allegations of motivation for termination of Shinault's employment, ceased its inquiry. (App. 32-34, 39-40.) The Tenth Circuit, citing this finding, condoned the trial court's error and thereby departed from the analysis of other circuits in refusing to examine Skinner's legal assertions on appeal. (App. 9.)

It is clear that the Tenth Circuit's application of Johnson, and implicit rejection of the application of Behrens, to Skinner's appeal, constitutes a significant conflict with the decisions of other United States courts of appeals on the matter of jurisdiction of qualified

immunity appeals, and emasulates the continued viability of rules such as that in Mt. Healthy, which call for a de novo review of the sufficiency of the plaintiff's proferred proof as a matter of law.

**SUMMARY**

The Tenth Circuit's refusal to find it has jurisdiction to undertake de novo the legal analysis required by Mt. Healthy, implicitly rejects Behrens and evidences an assumption by that court that such an analysis is no longer required. The consequences impact not only Skinner, but also all other such officials or employees within the circuit, and the public, unjustly denying them the "entitlement not to stand trial or face the other burdens of litigation[.]" Mitchell v. Forsyth, 472 U.S. at 526, 105 S.Ct. at 2815. This Court should assume jurisdiction and reverse the judgment of the Tenth Circuit.

Respectfully submitted.

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FILED

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OFFICE OF THE CLERK

No._____

In The
Supreme Court of the United States
October Term, 1996

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLEVELAND, OKLAHOMA, ET AL.,

Petitioners,

v.

JERRY SHINAULT,

Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit

# PETITIONERS' APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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136 pp

# TABLE OF CONTENTS TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Page

Order of the Tenth Circuit. . . . . App. 1

Order of the District Court. . . . . App. 11

Tenth Circuit order denying rehearing. . . . . App. 52

Defendants-Appellants/Cross-Appellees
Brief in support of court's jurisdiction. . . . . App. 54

Defendants-Appellants/Cross-Appellees
brief regarding subject matter jurisdiction. . . . . App. 70

Answer brief of appellee. . . . . App. 100

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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|---|---|---|
| JERRY SHINAULT, | ‖ | |
| | ‖ | |
| Plaintiff- Appellee/ Cross-Appellant | ‖ | Nos. 94-6318 94-6354 |
| | ‖ | |
| | ‖ | |
| | ‖ | |
| THE CLEVELAND COUNTY BOARD OF COUNTY COMMISSIONERS, a Political Subdivision of the State of Oklahoma; GEORGE SKINNER, County Commissioner, as public officer in his official capacity, and in his individual capacity; LEROY KROHMER, JAN COLLINS, County Commissioners, public officers in their official capacities, | ‖ | |
| | ‖ | |
| Defendants-Appellants/ Cross-Appellees. | ‖ | |

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**
**(D. Ct. No. CIV-93-690-R)**

Gary W. Gardenhire (Thomas E. Kemp, Jr. and Charles L. Broadway with him on the brief), Norman, Oklahoma, appearing for the Appellee/Cross-Appellant.

Andrew W. Lester (Shannon F. Davies with him on the briefs), Lester & Bryant, P.C., Oklahoma City, Oklahoma, appearing for the Appellants/Cross-Appellees.

Before ANDERSON, TACHA, and BALDOCK, Circuit Judges.

TACHA, Circuit Judge.

After Jerry Shinault was dismissed from his position as Cleveland County District 2 road foreman, he sued the Board of County Commissioners, Commissioners George Skinner, Leroy Krohmer, and Jan Collins in their official capacities, and George Skinner in his individual capacity. Shinault brought claims under 42 U.S.C. § 1983 alleging that his dismissal deprived him of liberty and property without due process, his right to equal protection of the laws, and his associational rights under the First Amendment. He also brought a claim for conspiracy to violate his

civil rights under 42 U.S.C. § 1985, as well as state law claims for malicious prosecution, defamation, and intentional infliction of emotional distress.

The district court granted summary judgment to all defendants on all claims except the First Amendment claim. The court also denied Skinner's motion for summary judgment based on qualified immunity. Both sides appeal. Skinner appeals the denial of qualified immunity. All defendants appeal the denial of their summary judgment motion on the First Amendment claim. Shinault cross-appeals the grant of summary judgment on his due process, equal protection, and federal conspiracy claims. We find that we do not have jurisdiction over Skinner's interlocutory appeal of the denial of qualified immunity. Consequently, we are without jurisdiction to review any of the other claims. Accordingly, we dismiss the appeals.

**Background**

The facts of this case revolve around the 1986 and 1990 elections for the Cleveland County Board of County Commissioners. Prior to the 1986 election, Jerry Shinault and defendant Leroy Krohmer had been

close personal friends. In the 1986 election, Krohmer lost his reelection bid for District 3 County Commissioner to Neil Steely (Krohmer regained his post in 1990). After the election, Shinault informed Krohmer that he had agreed to go to work for Steely. Krohmer became highly upset because he thought that Shinault had worked against him in the 1986 County Commissioner's race. The two have not been friends since that time.

In the 1990 election, Shinault ran against defendant George Skinner for District 2 County Commissioner. After Skinner defeated Shinault in the Democratic primary, he sought Shinault's support in the general election. Shinault agreed to support Skinner, and to that end Shinault built and hauled signs, provided transportation, and introduced Skinner to people around the county. After winning the general election, Skinner offered Shinault employment as the District 2 road foreman. Shinault accepted and began work in January 1991.

The very month that Skinner hired Shinault, Krohmer requested a criminal investigation of Shinault by the Cleveland County District Attorney's Office. Skinner was aware of this investigation. Seven months

later, after the initial investigation cleared Shinault of any wrongdoing, Krohmer initiated a second investigation. Krohmer told Skinner that two citizens had complained that the driveway of a county employee had been paved using county equipment and materials. At the time, District 2 employees had just finished an oil and chip paving job for the Little Axe School District. Krohmer and Skinner drove past the school and discovered that the driveway of county employee James Bruesch had recently been oiled and chipped. In a subsequent meeting with Skinner, Shinault admitted that he was aware that county employees had worked on Bruesch's driveway and that he had been present during at least part of the project.

Skinner dismissed Shinault in September, 1991, for using county equipment and materials to pave Bruesch's driveway. The Cleveland County District Attorney filed criminal charges against Shinault for embezzlement of county property, a charge of which Shinault was later acquitted. Over the course of these events, Skinner issued various press releases concerning the investigation, criminal charges, and acquittal.

Shinault argues that his dismissal, the criminal charges, and the

press releases were actually an underhanded attempt by the County Commissioners to discredit a past, and perhaps future, political opponent. In support of his interpretation of the events, Shinault claims that the equipment used to pave Bruesch's driveway was on loan to the school district, that the oil and chips were the property of the school district, and that the paving was done at the direction of a school district employee. He explains that Bruesch had allowed county road crews to use his driveway and adjacent storage area for thirty years. Over that time, county officials repaired Bruesch's drive using county equipment and materials without the county taking any punitive action against the responsible employees. Shinault also claims that another county employee used materials and equipment from the same Little Axe school project to pave his own driveway without being fired, criminally prosecuted, or made the subject of Skinner's press releases. Moreover, Shinault claims that shortly before the incident that led to his termination, he repaired the driveway of Blake Virgin, Skinner's son-in-law, at the direction of Virgin and Skinner. Given these events and the political circumstances at the time, Shinault argues that his dismissal was the result of something rotten in Cleveland County.

**Jurisdiction**

Skinner maintains that this court has appellate jurisdiction over the denial of his motion for summary judgment based on qualified immunity. All defendants request that we exercise pendent appellate jurisdiction over the district court's refusal to grant summary judgment on Shinault's First Amendment claim. Shinault argues that we lack jurisdiction over the qualified immunity issue, but claims in the alternative that if we hold that we have such jurisdiction, we should then exercise pendent appellate jurisdiction over his due process, equal protection, and federal conspiracy claims as well.

Before we can exercise pendent appellate jurisdiction over any claim in this case, we must first determine whether we have jurisdiction over the denial of Skinner's qualified immunity: without that "hook," we cannot exercise pendent appellate jurisdiction over the rest of the claims. Interlocutory appeals of denials of qualified immunity are permissible. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The scope of such appeals, however, is limited to "purely legal" challenges to the district court's ruling. Johnson v. Jones, 115 S.Ct. 2151, 2156 (1995). "[A] defendant,

entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Id., at 2159. Our jurisdiction, then, turns on what portion of the district court order Skinner appeals.

Claims of qualified immunity are analyzed under a two-part framework. The court first determines whether the plaintiff has asserted a violation of a statutory or constitutional right at all. Then the court assesses whether that right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right. Liebson v. New Mexico Corrections Dept., 73 F.3d 274, 276 (10th Cir. 1996); see Siegert v. Gilly, 500 U.S. 226, 231-2 (1991).

Shinault asserts that Skinner fired him for political patronage reasons. The district court first found that, based upon the events set out above, there was a genuine issue of material fact as to Skinner's motive for firing Shinault. The court then made the two-part legal finding, citing Branti v. Finkel 445 U.S. 507 (1980) and Elrod v. Burns, 427 U.S. 347

(1976), that (1) Shinault's assertion, if true, amounts to a violation of his First Amendment right of association and (2) that right was clearly established at the time of the dismissal such that a reasonable person in the defendant's position would have known that his conduct violated the right. Under Johnson, Skinner may make an interlocutory appeal of these two legal findings. However, Skinner fails to contest either of them: he does not argue that firing a person for political patronage reasons is not a violation of that person's First Amendment right of association, nor does he argue that such a rule was not clearly established at the time of the termination. Instead, Skinner contests the factual finding that he had an illegitimate motive in firing Shinault. But the district court found that a genuine issue of material fact existed as to whether Skinner fired Shinault for engaging in constitutionally protected political activities and, under Johnson, that finding is unreviewable. Indeed, an examination of Skinner's motivation for firing Shinault is just the sort of nebulous factual assessment that Johnson leaves to the district courts. See Johnson, 115 S.Ct. at 2158:

> Skinner counters that, under Johnson, we should take the facts

assumed by the district court as given and determine whether those facts state a violation of clearly established law. Skinner spends most of his brief on the jurisdiction question arguing that the undisputed facts on the record do not give rise to a nexus between Shinault's political activities and his dismissal. But the relevant "assumed fact" is that Skinner fired Shinault for political patronage reasons, and Skinner does not contest the purely legal holdings that such an action violates Shinault's First Amendment right of association or that such a right was clearly established at the time of termination. Skinner contests the district court's factual determination, and thus we are without jurisdiction to review his appeal.

Because we lack jurisdiction over Skinner's appeal of the denial of qualified immunity, we cannot exercise pendent appellate jurisdiction to review any of the defendants' or Shinault's other claims. These appeals are therefore DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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| JERRY SHINAULT, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIV-93-690-R |
| | ) | |
| | ) | |
| BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLEVELAND, OKLAHOMA et al., | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

Before the Court are cross-motions for summary judgment filed on behalf of the Plaintiff, Jerry Shinault, and the Defendants, Board of County Commissioners of the County of Cleveland, George Skinner, Leroy Krohmer and Jan Collins.[1]

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[1] Defendants George Skinner, Leroy Krohmer and Jan Collins are sued in their official capacities as county commissioners. The Court interprets the "official capacity" claims as claims against the County. See Laidley v. McClain, 914 F.2d 1386, 1392 (10th Cir. 1990). See also Papsan v. Allain, 478 U.S. 265, 276-79. 106 S.Ct. 2932, 92 L.Ed.2d 209

I.

The Plaintiff, Jerry Shinault, was formerly employed by Cleveland County as a road foreman, and was terminated from his employment in September, 1991. The Plaintiff brings this action under 42 U.S.C. §1983 alleging that his termination deprived him of liberty and property interests without due process, of his associational rights under the First Amendment, and of his right to equal protection of the laws under the Fourteenth Amendment. The Plaintiff also brings a claim of conspiracy to violate his civil rights under 42 U.S.C. § 1985, as well as state law claims for malicious prosecution, defamation and intentional infliction of emotional distress.

The Plaintiff first became employed by Cleveland County in 1986 or early 1987. His supervisor at that time was Neil Steely, then District 3 County Commissioner. (Deposition of Jerry Shinault, March 4, 1994, p. 18).

In July, 1991, Defendant George Skinner ("Skinner"), District 2

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(1986) (claims against state officials are in effect a suit against the state itself): Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Defendant George Skinner is also sued in his individual capacity.

County Commissioner, Cleveland County, met with the Plaintiff to discuss the fact that Skinner had heard that employees within his district had been using county equipment on private property without authorization. Skinner and the Plaintiff discussed the fact that such use of county equipment and materials was improper. (Affidavit of George Skinner, May 2, 1994, pars. 2, 3, Exhibit "A" to Appendix to Brief in Support of Defendant's Motion for Summary Judgment). The next day, Skinner met with all District 2 employees, including the Plaintiff, and informed them that he considered it improper and unlawful for a county employee to use county equipment, funds or materials to perform work on private property. (Skinner Affidavit, par. 4.)

On August 25, 1991, Skinner received a telephone call from Defendant Leroy Krohmer, District 3 County Commissioner ("Krohmer"). Krohmer informed Skinner that two citizens had complained that the driveway of a county employee had been paved with oil and chips using county equipment. (Skinner Affidavit, par. 5). At the time, employees of District 2 had just completed an oil and chip paving job for the Little Axe School District. Skinner and Krohmer drove past the Little Axe school

and discovered that the driveway of James Bruesch, a District 2 county employee, had been freshly oiled and chipped. (Deposition of George Skinner, October 27, 1993, pp. 37-39).

After reviewing the site, Skinner contacted his son-in-law and attorney, Mr. Blake Virgin, to discuss the matter. Skinner and Virgin drove past James Bruesch's house. (Skinner Affidavit, pars. 7-9). The Plaintiff later met with Virgin and Skinner at their request, and admitted to them that he was aware that county employees had oiled and chipped Bruesch's driveway, and that he was present during at least part of the project. (Skinner Affidavit, pars. 9-10; Plaintiff's Deposition, pp. 67-69, 151).

Skinner then prepared and issued a press release with Virgin's advice and assistance, stating that the Cleveland County District Attorney's office was "investigating the possibility that road crew employees ha[d] violated state law." (Skinner Affidavit, par. 11). The press release further stated, inter alia, that Skinner had "uncovered evidence . . . that, if confirmed, may implicate one or more employees in his district in misuse of county funds and materials." (Skinner Affidavit,

par. 11, Exhibit "A" to Complaint). The substance of this press release was reported in The Norman Transcript on August 26, 1991. Neither the press release nor the article identifies the Plaintiff by name. Id.

On August 26, 1991, Skinner reported his "findings" to Reginald Gaston, an Assistant District Attorney assigned to represent the County in civil matters. (Skinner Affidavit, par. 11). Gaston advised Skinner that it was appropriate to terminate the Plaintiff's employment, to suspend Bruesch and to reprimand another employee for their "misuse of county equipment" because of the driveway paving incident. (Skinner Affidavit, par. 14). Skinner terminated the Plaintiff in September, 1991. (Skinner Affidavit, par. 14).

Assistant District Attorney Gaston conducted an investigation through the District Attorney's office of the driveway paving incident. Kenneth "Bud" Argo, an investigator for the District Attorney's office, was assigned to the case. (Affidavits of Reginald Gaston and Kenneth Argo, May 2, 1994, Exhibits "E" and "F", Appendix to Brief in Support of Defendant's Motion for Summary Judgment). Argo met with several county employees who had been present when the driveway was paved.

Argo contacted the Little Axe school superintendent and the Little Axe employee who assisted county employees on the school paving project. Argo also interviewed Bruesch, who admitted that he had allowed county employees to use county-owned equipment to oil and chip his driveway. Argo interviewed the Plaintiff, who also admitted that he had been present when county employees oiled and chipped Bruesch's driveway, and that he did not stop them from doing so. (Argo Affidavit).

Argo completed his investigative report on the Little Axe project on September 5, 1991. The report was presented to the Cleveland County District Attorney, who filed criminal charges against both the Plaintiff and Bruesch on November 7, 1991. Bruesch pled guilty to a misdemeanor charge of misusing county equipment on February 4, 1992.

On the day the criminal charges were filed, Skinner issued a second press release which stated that he was "waiting for additional information from another party" concerning "alleged misuse of county equipment." (Skinner Affidavit, par. 15). This press release was the subject of an article published in The Norman Transcript, which reported that "District 2 warehouse employee James Bruesch appeared in court and

pleaded not guilty to one count of embezzlement in concert with former District 2 warehouse foreman Jerry Shinault . . . ." (Exhibit "B" to Complaint).

The Plaintiff pled not guilty, and on May 20, 1992, a jury acquitted the Plaintiff of the embezzlement charge. After the jury verdict, Skinner issued a third press release expressing his opinion on the jury's verdict. (Skinner Affidavit, par. 16; see also press release attached to Skinner's Affidavit). Skinner said, in reference to the verdict, that he was "personally fed up" with the "way the government tends to minimize criminal behavior in its ranks." Id. Skinner "promised to continue his guard against" such criminal activity. Skinner said that he "[w]ould not condone the improper use of public funds and [that] any of [his] employees who do so will be dealt with swiftly and surely, as in this case." Id. Skinner said "the . . . [Plaintiff's] acquittal in no way changes my belief that his actions in allowing county equipment and labor to be used on private property were improper and a violation of the public trust." Id. Skinner's press release was the subject of articles published in both The Norman Transcript and The Daily Oklahoman. (Exhibits "C"

and "D" to Complaint).

For approximately thirty years prior to the Plaintiff's termination, the County had maintained a storage area for county road equipment on the Bruesch property. Bruesch allowed the County to use his driveway and adjacent storage area at no cost to the County. (Plaintiff's deposition, p. 137, 138). Defendant Krohmer was in charge of obtaining easements for District 2; he did not obtain an easement on the Bruesch property because it had been used by the County for many years. (Deposition of Leroy Krohmer, April 15, 1994, p. 145).

The Plaintiff's evidence shows that over the years, the County's use had damaged Bruesch's property. (Affidavit of James E. Bruesch, undated, Exhibit "E" to Plaintiff's Appendix to Brief in Support of Motion for Partial Summary Judgment). Fuels and oils had been spilled on the driveway and storage pads; and the road equipment had dug ruts in the driveway, causing erosion of the driveway surface. (Bruesch Affidavit, pars. 7-8). The County parked motorized road graders, dump trucks, backhoes, trailers, mowers, pickups and other vehicles, and stored fuel tanks, batteries, jumper cables, anti-freeze, solvents, road hazard signs

and other equipment and materials on the Bruesch property. (Bruesch Affidavit, par. 6). The Bruesch driveway was and is the exclusive means of ingress and egress to the storage area where county equipment and materials are kept; and sometimes the driveway itself is used to park county vehicles. County employees had previously repaired Bruesch's drive using county equipment and materials, with no punitive action taken against the employees responsible. (Krohmer Affidavit, pp. 85-86, 90, 92, 148-150).

Skinner testified at the Plaintiff's unemployment hearing that the equipment used to pave the driveway was at the time on loan to the Little Axe School District, and that the oil and chips were the property of the school district. The Plaintiff contends that the materials used on the driveway were waste materials which had to be disposed of, and that the paving of Bruesch's driveway was done at the direction of a school district employee.

The Plaintiff offers evidence demonstrating that Mr. Reginald Gaston, the Assistant District Attorney who prosecuted him, was the former associate of Blake Virgin, Skinner's son-in-law and attorney.

(Deposition of Reginald Gaston, April 6, 1994, p. 23). Blake Virgin is the "distant cousin" of a county employee identified as Tommy Jones; the Plaintiff alleges that Tommy Jones committed theft when he used materials and equipment from the same Little Axe school project to pave his own driveway. (Skinner deposition, pp. 136-138). Jones was not criminally prosecuted, nor was he fired or suspended, or mentioned in any of the press releases. The Plaintiff also testified that shortly before the incident which led to his termination, he repaired Blake Virgin's driveway, at the behest of both Virgin and Skinner. (Plaintiff's Deposition, pp. 70-74).

The Plaintiff's evidence shows that the Plaintiff ran for the District 2 County Commissioner post twice; once in 1986, and once against Skinner, in 1990. After Skinner defeated the Plaintiff in the Democratic primary, Skinner and Virgin approached the Plaintiff, seeking his support and help for Skinner in the 1990 general election. The Plaintiff built and hauled signs for Skinner, transported Skinner around the County, and introduced him to people. (Plaintiff's Deposition, pp. 35-37, pp. 125-128).

Prior to the 1986 election, the Plaintiff and Mr. Krohmer had been

close personal friends. (Plaintiff's Deposition, pp. 117-120). At that time, Krohmer had almost completed his first term as District 3 County Commissioner, and was defeated in a re-election bid by Neil Steely.[2] Krohmer came to the Plaintiff's home for a visit during Krohmer's final week in office. During that visit, the Plaintiff informed Krohmer that he had agreed to go to work for Steely. Krohmer appeared upset, and abruptly left the Plaintiff's home. The Plaintiff and Mr. Krohmer have not been friends since that time. (Plaintiff's Deposition, pp. 119-120). Krohmer appeared to be "highly upset" because he thought the Plaintiff had worked against him in the 1986 County Commissioner's race. (Plaintiff's Deposition, p. 120).

The Plaintiff filed an application for unemployment benefits on September 10, 1991. On October 29, 1991, the Oklahoma Employment Security Commission Appeal Tribunal found that the Plaintiff "failed to usegood judgment" when he allowed the crew to follow the directions of the school employee contrary to the directions of the County

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[2] Krohmer regained the office by defeating Neil Steely in the 1990 election.

Commissioner that no county equipment be used on private property, but that the evidence did not support a finding that the Plaintiff's actions were an intentional disregard of the employer's interests or his own obligation to the employer. The Appeal Tribunal reversed the Commission's initial rejection of the Plaintiff's application for unemployment benefits; and the Appeal Tribunal's decision was affirmed by the Board of Review. (Exhibit "H", Plaintiff's Appendix to Brief in Support of Plaintiff's Motion for Partial Summary Judgment).

II. **Liberty Interest Claim**

The Plaintiff claims that he was deprived of a liberty interest without due process by virtue of the three press releases issued by Defendant Skinner, and by several newspaper articles which published the contents of the press release. In order to prevail on his liberty interest claim, the Plaintiff must show: 1) that his employment was terminated; and 2) that in connection with his termination, the Defendant employer made a public statement which was both (a) false and (b) stigmatizing to the Plaintiff. For example, where a public employer makes unfounded, public accusations of dishonesty or immorality that might seriously

damage the employee's standing or associations in the community and foreclose the employee's freedom to take advantage of future employment opportunities, the employee's liberty interest is implicated. Melton v. City of Oklahoma City, 928 F.2d 920, 927 (10th Cir. 1990), cert. denied, ___U.S.____, 112 S.Ct. 296, 116 L.Ed.2d 241 (1991); Lane v. Town of Dover, 761 F. Supp. 768, 771-72 (W.D. Okla. 1991), aff'd, 951 F.2d 291 (10th Cir. 1991). Reputational injury alone does not implicate a liberty interest; the reputational damage must be entangled with some other tangible interests such as employment. Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989); citing McGhee v. Draper, 639 F.2d 639, 643 (10th Cir. 1981). Further, the Supreme Court has held that a liberty interest is implicated only when the stigmatizing statements occur "in the course of the termination of employment." Paul v. Davis, 424 U.S. 693, 710, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976).

The August 26, 1991 article which appeared in The Norman Transcript prior to the Plaintiff's termination quotes Skinner as announcing that the Cleveland County District Attorney's Office was "investigating the possibility that road crew employees have violated state

law." Skinner reportedly said that he had "uncovered evidence . . . that, if confirmed may implicate one or more employees in his district in misuse of county funds and materials." The article reports the fact that Skinner had met with Assistant District Attorney Gaston, and reiterates Skinner's policy of insisting on absolute honesty and accountability in the utilization of county funds and road materials. The Plaintiff has not shown that any of these statements are false. Reporting that an investigation is being conducted will not support a liberty interest claim if, in fact, an investigation is being conducted. Primas v. City of Oklahoma City, 958 F.2d 1506 (10th Cir. 1992). Moreover, the first press release, as reported in the August 26, 1991 article, does not specifically mention the Plaintiff by name. The Plaintiff has not shown how this press release and article could be considered "stigmatizing" to him so as to support a liberty interest claim.

Skinner's second press release, which led to an article in The Norman Transcript on November 7, 1991, stated that misdemeanor embezzlement charges had been filed against "two Cleveland County warehouse employees," and that Skinner was "waiting for additional

information from another party involved in alleged misuse of county equipment. The Plaintiff has not shown that either of those statements is false; he and James Bruesch had in fact been charged with embezzlement as reported. The article further reports that James Bruesch had appeared in court and "pleaded not guilty to one count of embezzlement in concert with former District 2 warehouse foreman Jerry Shinault". The Plaintiff does not deny that Bruesch entered such a plea. The article reports that Plaintiff and Bruesch were "accused" of embezzling the "use of a chip spreader, an oil distributed truck, a road grader, packer and dump truck . . . for their own use, without the county's consent or knowledge." First, the Court notes that this particular statement is not attributed to Skinner or any of the other Defendants; rather, the information appears to have been obtained from court records. Second, the Plaintiff has not shown that this statement is false. The Plaintiff does not dispute that he and Bruesch were in fact "accused" in a criminal Information of embezzling the use of county equipment. Finally, the Court notes that the second press release was published some two months after the Plaintiff's termination, and thus was not published "in the course

of" the Plaintiff's termination. See Wulf v. City of Wichita, 883 F.2d at 869. The Court concludes, therefore, that the November 7, 1991 article did not deprive the Plaintiff of a liberty interest.

Skinner's third press release, which was reported in The Norman Transcript and The Daily Oklahoman in May, 1992, expressed Skinner's opinion of the jury's verdict acquitting the Plaintiff of the criminal charges. Skinner stated that he was "fed up" with the way "government tends to minimize criminal behavior in its ranks," and "promised to continue his guard against it." Skinner said: "I will not condone the improper use of public funds, and any of my employees who do so will be dealt with swiftly and surely, as in this case." These statements consist of expressions of Skinner's opinions, Skinner's polic.es and his intentions with respect to the use of public funds and property; and thus cannot be regarded as "false" or as stigmatizing to the Plaintiff.

In the same press release, Skinner also said: "[Shinault's] criminal acquittal in no way changes my belief that his actions in allowing county equipment and labor to be used on private property were improper and a violation of the public trust." The Court interprets this sentence as

consisting primarily of an expression of opinion as to the propriety of the Plaintiff's actions; but it may also be interpreted as containing a statement of fact to the extent that it necessarily implies that the Plaintiff committed the acts upon which an opinion is expressed. Such statements are treated in the law of defamation as containing assertions of fact as well as opinions. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). (Holding that there is no wholesale exemption in the law of defamation for anything that might be labeled an opinion; recognizing that expressions of opinion often imply an assertion of objective fact); Masson v. New Yorker Magazine, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

Nevertheless, the statement does not implicate a liberty interest because the Plaintiff has not shown that it is false or stigmatizing. The Plaintiff does not deny the substance of Skinner's factual assertions; rather, he seeks to explain his actions, and he argues that his actions were entirely proper under the circumstances. Although the Plaintiff argues that the Little Axe school personnel, rather than he, "allowed" the paving of Bruesch's driveway, the Plaintiff does not dispute that he was the

supervisor of the county road crew which paved the drive. The Plaintiff admits that he said and did nothing to try to prevent the crew from paving the drive[3]. The Plaintiff admits that the equipment used to do the paving was owned by the county, although he asserts that it was on loan to the school district at the time. The Plaintiff admits that the driveway in question was located on property which was owned by a private individual, Mr. Bruesch, although he asserts that the county had made regular use of the drive and the adjacent storage area. In light of the evidence and the Plaintiff's admissions, the Court finds that this statement is "substantially true", and thus does not implicate a liberty interest. Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1992); Hicks v. City of Watonga, 942 F.2d 737 (10th Cir. 1991).

The Court further notes that Skinner's third press release was published approximately eight months after the Plaintiff's termination, and thus was not published "in the course of" the Plaintiff's termination. See Wulf v. City of Wichita, 883 F.2d at 869.

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[3] The Plaintiff testified at his Employment Security Commission hearing: "Like I said I could have stopped the incident, you know I didn't tell them to do it and I didn't tell them not to do it".

III. Property Interest Claim

The Plaintiff claims that he was deprived of a property interest in his continued employment without due process. The Plaintiff must demonstrate first that he possesses a property interest in his employment sufficient to trigger the due process protections of the Constitution. Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Whether an employee has a property interest subject to Fourteenth Amendment due process protection is a matter of state law. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

The Plaintiff claims that he had a property interest in his employment under Oklahoma law by virtue of the County's "custom" and "practice." The Plaintiff offers evidence that after his termination in 1991, the County adopted a written personnel manual. (See Employee Handbook, attached as Exhibit 7 to the Deposition of George Skinner). The personnel manual contains a section entitled "Employee Conduct", which incorporated the previous oral policy against personal use of county property. The manual also includes a section entitled "Complaint Resolution Procedures -- Open Door Policy," which provides:

**COMPLAINT RESOLUTION PROCEDURE - OPEN DOOR POLICY**

> Misunderstandings or conflicts can arise in any organization. To ensure effective working relations, it is important that such matters be resolved before serious problems develop. Most incidents will resolve themselves naturally; however, should a situation persist that you believe is detrimental to you or to the County, free discussion with your immediate supervisor or the County official is encouraged. These individuals will endeavor to work out a satisfactory solution to the problem.

Cleveland County Employee Handbook, p. 13.

Defendant Krohmer testified on deposition that the County's previous, unwritten policy for resolving employee complaints was "similar," and that at the time the Plaintiff was fired, it was the County's "standard practice" to disclose to an employee "all information" concerning any complaints against the employee. Based upon this testimony, the Plaintiff claims that he had a right to disclosure of any complaints against him. The Plaintiff claims that this right was violated when County officials failed to disclose to him certain information obtained during their investigation of the paving incident.

The County's complaint resolution provision, as outlined in the

new Employee Handbook, on its face is geared toward complaints by county employees, not complaints by County officials against employees. The Court finds nothing in the complaint resolution section of the Handbook which creates an implied contract, or suggests that employees have any legitimate expectation of continued employment. Any such interpretation would be at odds with the Employee Handbook contains an express provision which states in unambiguous terms that employees may be terminated at will, for any reason or no reason[4]. Although the Employee Handbook was adopted after the Plaintiff's termination, none of the evidence before the Court suggests that the Plaintiff's relationship with the County was any different from that subsequently expressed in the

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[4] The Handbook provides:

DISCHARGE

> In order for Cleveland County to carry out its obligation and priorities in the most efficient manner possible, the County adheres to the principles of AT-WILL employment whereby the County and employees alike can terminate the employment relationship at any time and for any reason or no reason.

Cleveland County Employee Handbook, p. 16 (emphasis in original).

Employee Handbook. Although Oklahoma law recognizes that "at-will" employment may be altered by personnel procedures amounting to an implied contract; see Carnes v. Parker, 922 F.2d 1506 (10th Cir. 1991); Jackson v. Integra Inc., 952 F.2d 1260 (10th Cir. 1991), no such implied contract was created in this case. The Court finds that the Plaintiff has not shown that he had a property interest in his continued employment.

## IV. First Amendment Claim

The Plaintiff claims that the Defendants have violated his First Amendment rights by retaliating against him for running against Defendant Skinner in the 1990 Democratic primary, or for his prior support of Neil Steely, who was Defendant Krohmer's political opponent in the 1986 and 1990 elections.

The Supreme Court has made it clear that terminating a public employee for political patronage reasons, including support of an opposing political candidate, violates the employee's First Amendment rights. Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547

(1976). See also Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990).[5] On the Plaintiff's First Amendment retaliation claim, liability depends upon the motivation behind the Defendants' actions. The Plaintiff bears the burden of establishing that retaliation for exercising First Amendment rights was a substantial or motivating factor in the decision to terminate his employment. Wagner v. Wheeler, 13 F.3d 86 (4th Cir. 1993).

The evidence shows that the Defendants knew of the Plaintiff's protected political activities during the 1990 election, and terminated the Plaintiff less than one year later. In addition, the Plaintiff's evidence shows that although he was discharged, other employees who participated in the same or similar incidents, were either not disciplined at all or were treated much less severely. This evidence of the sequence of events, combined with the evidence of disparate treatment, is sufficient to raise

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[5] The Defendants do not contend that the Plaintiff was exempt from First Amendment protection on the ground that he held a high-level or policy-making position. See Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Nor do the Defendants argue that the Plaintiff's position was one of a confidential nature. See Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990), citing Dickeson v. Quarberg, 844 F.2d 1435, 1441 (10th Cir. 1988).

a genuine issue of material fact as to the motivation of Defendants Skinner and Krohmer in discharging the Plaintiff. Accord, Love v. Re/Max of America, Inc., 738 F.2d 383, 386 (10th Cir. 1984); Miller v. Fairchild Industries Inc., 797 F.2d 727 (9th Cir. 1985). A reasonable trier of fact could infer that the Plaintiff was singled out for termination because of his protected political activities. When all the evidence is viewed in the light most favorable to the Plaintiff, and all reasonable inferences are drawn in his favor, there is a genuine issue of material fact as to whether the Plaintiff's protected political activity was a substantial or motivating factor in his termination. The Defendants are not entitled to summary judgment on the Plaintiff's First Amendment claim.

## V. Equal Protection Claim

The Plaintiff claims that the Defendants deprived him of equal protection of the laws in violation of the Fourteenth Amendment. In order to succeed on a class-based equal protection claim, the Plaintiff must demonstrate that he was a member of some particular group who was singled out for disparate treatment and suffered damages as a result. Personnel Administration of Massachusetts v. Feeney, 442 U.S. 256, 279,

99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). The Plaintiff must prove that he has suffered "intentional and purposeful discrimination" in order to make a class-based equal protection claim. Kelly v. Cooper, 502 F. Supp. 1371, 1375 (E.D. Va. 1980); Cerrato v. San Francisco, 26 F.3d 968, 1994 WL 262058 (9th Cir. 1994). The Plaintiff offers no evidence that he belongs to a protected class[6], and no evidence of discriminatory intent on the part of the Defendants; the Plaintiff's evidence does not support a claim for class-based discrimination.

The Plaintiff also argues that the Defendants violated his constitutional right to equal protection of the laws in that they terminated his employment pursuant to a policy which was vague, and which was applied in an arbitrary and capricious manner. The Plaintiff complains that the County's policy had "many sources" which were "never catalogued nor otherwise compiled and cogently made known" to him until the incident which precipitated his termination. The Plaintiff argues

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[6] The Plaintiff testified in his deposition that he is fifty-three years of age. (Plaintiff's Deposition. pp. 7, 124). The Plaintiff does not claim that he was discriminated against on the basis of age.

that he was not given any guidance in the application of the policy to extraordinary situations, such as that which occurred on the day Bruesch's driveway was paved. The Court does not view the challenged policy as impermissibly vague or as impinging upon any protected rights of County employees.

Cleveland County employees such as the Plaintiff have no fundamental right to government employment. Accord, Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992). To the contrary, the Plaintiff was an employee at will who could be terminated without cause. Thus, the County's policy deprived the Plaintiff of equal protection only if the policy lacks a rational relationship to any legitimate governmental goal. Welsh, 977 F.2d at 1420[7]. The County had legitimate governmental interests in preserving its equipment purchased at taxpayer expense, and in promoting public confidence in the integrity of county officials and employees. The Defendant's policy of prohibiting the use of county

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[7] The "rational basis" standard of review under equal protection analysis is the same as the rational basis or minimal scrutiny test for substantive due process claims. R. Rotunda & J. Nowak, Treatise on Constitutional Law: Substance and Procedure, 2d § 15.4 ( 1992).

equipment on privately owned property, and the Defendants' termination of the Plaintiff, are rationally related to the governmental interests.

The Plaintiff's complaint that the policy was arbitrarily and capriciously applied also lacks merit. Since the Plaintiff was an employee at will, the County did not need "cause" to discharge him; the County did not need to rely upon the policy to justify his discharge. Since the Plaintiff has shown no evidence suggesting unlawful discrimination against him, the fact that he was terminated while others were not does not render the policy violative of equal protection.

## VI. Conspiracy Claim

The Plaintiff asserts a conspiracy claim under Title 42 U.S.C. § 1983[8] A Section 1983 conspiracy claim may arise when a private actor conspires with a state actor to deprive a person of a constitutionally protected right under color of state law. Dixon v. City of Lawton, 898 F.2d 1443, 1449 (10th Cir. 1990). In this case, the Plaintiff alleges a

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[8] The Plaintiff does not rely upon 42 U.S.C. § 1985 as the basis for his conspiracy claim, and he offers no evidence which would support a Section 1985 conspiracy claim.

conspiracy to retaliate against him for the exercise of his First Amendment rights with regard to his political support of Neil Steely, as well as a conspiracy to prosecute him on meritless claims and to deny him an opportunity to be heard. In order for the Plaintiff to prevail on his Section 1983 conspiracy claim, he must prove not only the existence of a conspiracy but also an actual deprivation of rights. Dixon, 898 F.2d at 1449.

In this case, there are no private actors named as defendants. It appears to the Court that the only private persons with whom any of the Defendants could have allegedly conspired would be Blake Virgin, the private attorney who advised Skinner concerning the press releases, or the members of the press who published the stories. The Plaintiff offers no direct or circumstantial evidence that any of these people, or any other private actors, conspired with the Defendants to retaliate against the Plaintiff for his political activities, or to prosecute him on meritless claims, or to deny him an opportunity to be heard. Unsupported or conclusory allegations of a conspiracy do not state a conspiracy claim under Section 1983. Langley v. Adams County, 987 F.2d 1473 (10th Cir.

1993). Accord, Clulow v. Oklahoma, 700 F.2d 1291 (10th Cir. 1983), overruled on other grds, Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984).

VII. Skinners Qualified Immunity Defense

Defendant Skinner[9] asserts the affirmative defense of qualified immunity to the Plaintiff's Section 1983 claims. Qualified immunity shields government officials from the burdens of lawsuits stemming from the exercise of discretionary authority, conferring immunity from suit except where an official's conduct violates clearly established constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Jantz v. Muci, 976 F.2d 623, 627 (10th Cir. 1992).

In this case, the Court has found that there is a genuine issue of material fact as to whether the Plaintiff's protected political activities were a substantial or motivating factor in Skinner's decision to terminate the Plaintiff's employment. Clearly established law prohibits government

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[9] Skinner is the only individual Defendant sued in his personal capacity. Defendants Krohmer and Collins are sued only in their official capacities, and thus do not raise the defense of qualified immunity.

officials from firing public employees for political patronage reasons, including retaliation for the support of an opposing political candidate. See Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). In light of these authorities, the Court concludes that a reasonable official in Skinner's position would have known that firing the Plaintiff in retaliation for such activities violated the Plaintiff's First Amendment rights. Because there is a genuine issue of fact as to Skinner's motive in firing the Plaintiff, Skinner is not entitled to qualified immunity on the Plaintiff's First Amendment claim[10]

VIII. **Oklahoma Governmental Tort Claims Act**

The Defendants argue that the Plaintiff's state law tort claims against the County are barred by the Plaintiff's failure to file a timely notice of such claims pursuant to the Oklahoma Governmental Tort

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[10] Since the Plaintiff has not offered evidence sufficient to support his claims of a liberty or property interest deprivation, a denial of equal protection or of substantive due process, or a conspiracy to violate his civil rights, the Court does not consider whether Skinner would have been immune from those claims.

Claims Act, which provides, in part:

> A. Any person having a claim against the state or a political subdivision within the scope of Section 151 et seq. of this title shall present a claim to the state or political subdivision for any appropriate relief including the award of money damages.
>
> B. Claims against the state or a political subdivision are to be presented within one (l) year of the date the loss occurs. A claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (l) year after the loss occurs.
>
> . . .
>
> D. A claim against a political subdivision shall be in writing and filed with the office of the clerk of the governing body.
>
> Title 51 Okla. Stat. § 156.

The Plaintiff does not claim that he filed a timely notice of his tort claims with the County Clerk or any other official, as required by Section 156. Instead, the Plaintiff argues that Defendant Skinner is not protected by sovereign immunity because Skinner's acts are not within the scope of his employment as defined by the Act. This argument fails to acknowledge that, regardless of whether Skinner is shielded from personal liability no claim may be asserted against the County unless

notice of the claim is presented to the County on a timely basis. The State of Oklahoma has granted only a limited waiver of its sovereign immunity, applicable only to certain types of claims which are presented within a defined time period. All other claims against the State and its political subdivisions are barred. In this case, the Plaintiff has failed to show that he presented timely notice of his claim; thus his state law tort claims against the Defendant Board of County Commissioners are barred.

The Plaintiff argues, with respect to Defendant Skinner, that his actions were outside the scope of his employment because they were "fraudulent." The Plaintiff offers no evidence that Skinner's acts upon which Plaintiff bases his state law claims[11] were fraudulent, and the Plaintiff asserts no fraud claim against Skinner. Under the Act, conduct which amounts to a willful and wanton tort is considered to be outside the scope of employment. The individual government official may be held liable for such conduct, but the political subdivision may not. See Parker

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[11] The Plaintiff's state law claims against Skinner are for malicious prosecution, defamation and intentional infliction of emotional distress.

v. City of Midwest City, 850 P.2d 1065, 1068 (Okla. 1993). As set forth in the following paragraphs, Skinner bears no personal liability on the Plaintiff's state law tort claims because the Plaintiff has failed to offer sufficient evidence in support of those claims, thus entitling Skinner to summary judgment on those claims. See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265, 276 (1986).

IX. **Malicious Prosecution**

In order to prevail on his malicious prosecution claim, the Plaintiff must prove: 1) the bringing of the original action by the Defendant; 2) its successful termination in favor of the Plaintiff; 3) want of probable cause to bring the action; 4) malice, and 5) damages. Parker v. City of Midwest City, 850 P.2d 1065 (Okla. 1993), citing Young v. First State Bank of Watonga, 628 P.2d 707 (Okla. 1983). The Plaintiff alleges in this case that he is"advised that the actions of the Cleveland County District Attorney's office were made primarily at the behest and prompting of Defendant Krohmer." The Plaintiff has sued Defendant Krohmer only in his official capacity, and not in his individual capacity. The Plaintiff's "official capacity" claims against Krohmer and Collins are, in effect, a

claim against the County, and such a claim is barred by the Plaintiff's failure to comply with the Oklahoma Governmental Tort Claims Act. See Title 51 Okla. Stat. § 156.

The Defendants contend that Skinner had no involvement in the criminal prosecution of the Plaintiff other than reporting the incident to Assistant District Attorney Reginald Gaston and testifying at the criminal trial. The Plaintiff's evidence shows, however, that not only did Skinner do those things, he met with Kenneth "Bud" Argo, an investigator for the District Attorney's office, he wrote a letter to District Attorney J. Tully McCoy and requested that an investigation be conducted, and that if warranted, the individuals involved be prosecuted "to the extent of the law." This evidence does not meet the Plaintiffs burden of showing that Skinner "investigated" or "commenced" the criminal prosecution. See Park v. Security Bank & Trust Co., 512 P.2d 113 (Okla. 1973). Furthermore, the Plaintiff's evidence does not establish a lack of probable cause for the Plaintiff's prosecution. The Plaintiff's own statements to Skinner, and those of the other persons present, were sufficient to warrant a reasonable belief that the Plaintiff had committed the crime with which

he was charged. The fact that the Plaintiff was subsequently acquitted of the charges does not establish lack of probable cause. Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118 (10th Cir. 1979), cert. denied, 444 U.S. 856, 100 S.Ct. 116, 62 L.Ed.2d 75 (1979); Page v. Rose, 546 P.2d 617 (Okla. 1975) appeal after remand, 566 P.2d 439.

As the Defendants point out, the Oklahoma Governmental Tort Claims Act in effect immunizes the County from liability for malicious prosecution. If the county officials who prosecuted the Plaintiff were acting in good faith, the Plaintiff could not satisfy the essential element of malice; if they were acting in bad faith, their actions were outside the scope of their employment, and thus immune. Parker v. City of Midwest City, 850 P.2d 1065 (Okla. 1993). The Defendants are entitled to summary judgment on the Plaintiff's malicious prosecution claim.

X. **Defamation Claim**

Under Oklahoma law, a statement must be false in order to be defamatory; true statements cannot be defamatory as a matter of law. Tatum v. Philip Morris, Inc., 809 F. Supp. 1452 (W.D. Okla. 1992), aff'd, 16 F.3d 417 (10th Cir. 1993), cert. denied, __U.S____. 114 S.Ct. 1833,

128 L.Ed.2d 461 (1994). In this case, none of the three press releases attributable to Defendant contained false or defamatory statements. As addressed more fully in the Court's analysis of the Plaintiff's liberty interest claim, the first two press releases issued by Defendant Skinner contain: a) statements which do not identify the Plaintiff; b) true statements of fact concerning the investigation and filing of criminal charges, and c) Skinner's opinions and policies concerning the proper use of county property. Skinner's third press release contained statements which were substantially true, as well as statements which could only be understood as Skinner's opinions None of the three press releases are defamatory as a matter of law. See Masson v. New Yorker Magazine, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991); Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983); Metcalf v. KFOR-TV Inc., 828 F. Supp. 1515 (W.D. Okla.1992). The Court finds, accordingly, that the Defendants are entitled to summary judgment on the Plaintiff's state law defamation claim.

XI. Intentional Infliction of Emotional Distress

The Plaintiff claims that Skinner's actions in issuing the third press

release amount to intentional infliction of emotional distress. The Plaintiff argues that the third press release impugned his character, and that in the context of his acquittal of the embezzlement charge, the third press release was "outrageous" and "intended to cause great harm" to him. The Plaintiff also contends that "the withholding of material and exculpatory evidence" was outrageous conduct.

To prevail on his claim of intentional infliction of emotional distress, the Plaintiff must show that the Defendants' conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978); Daemi v. Church's Fried Chicken, 931 F.2d 1379 (10th Cir. 1991). The Plaintiff's evidence falls short of this standard. Skinner's conduct, including the third press release, cannot be characterized as beyond all possible bounds of decency. The Plaintiff has offered no evidence that any of the named Defendants caused exculpatory evidence to be withheld from him, or that the Board of County Commissioners had a policy of withholding exculpatory evidence.

Moreover, even if the Defendants had withheld the evidence in question, the Plaintiff has not shown that the evidence was exculpatory so as to entitle the Plaintiff to its disclosure. The mere possibility that undisclosed evidence is exculpatory does not amount to a constitutional violation. Under Brady v. Maryland, 373 U.S. 83 at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, disclosure of exculpatory or impeachment evidence is mandated only if that evidence is "material." The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Ballinger v. Kerby, 3 F.3d 1371 (10th Cir. 1993), citing United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Absent a showing of police or prosecutorial misconduct, a violation occurs only if the materiality and exculpatory value of the evidence were apparent at the time it was withheld, and the accused was unable to obtain comparable evidence by other reasonable, comparable means. United States v. Fleming, 19 F.3d 1325 (10th Cir. 1994).

In deciding whether the Defendants' alleged failure to disclose exculpatory evidence amounts to the intentional infliction of emotional

distress, the Court considers it significant that the Plaintiff has not demonstrated that the Defendants violated constitutional standards for disclosure of such evidence. Since the Defendants have not been shown to have violated their legal and constitutional obligations with respect to disclosure of exculpatory evidence, the Court finds that any failure on their part to disclose the investigative reports is not so outrageous or atrocious as to go beyond all possible bounds of decency. The Plaintiff's claim of intentional infliction of emotional distress is not supported by sufficient evidence.

## XII. Punitive Damages Under the Oklahoma Governmental Tort Claims Act

The Defendants argue that the Oklahoma Governmental Tort Claims Act prohibits an award of punitive damages on Plaintiff's state law claims. Since the Court concludes that the Defendants are entitled to summary judgment on each of the Plaintiff's state law claims, the Court finds that the issue of punitive damages is moot.

## XIII. Claim for Loss of Health Insurance Coverage

The Defendants argue that the Federal Employee Retirement

Income Security Act, Title 29 U.S.C. § 1144 ("ERISA"), preempts any state common law tort claim for recovery of damages for the loss of his health insurance coverage. Since the Court has granted summary judgment to the Defendants on the state law claims, the Plaintiff could not recover these damages under state law in any event. The Plaintiff argues, however, that he is entitled to recover damages for the loss of insurance coverage under his federal law claims.

The parties offer conflicting contentions as to whether the Defendants' actions caused the Plaintiff to lose his health insurance coverage. The Plaintiff correctly points out that, unlike the state law claims, his federal, constitutional claims are not preempted or "superseded" by ERISA. The Defendants assert that at the time of the Plaintiff's discharge, the Plaintiff was notified of his right to maintain his health insurance coverage. The Plaintiff claims that, as a result of his termination, he could not afford to maintain his health insurance coverage. Evidently the parties agree that after the Plaintiff's termination he lost his health insurance coverage. The question of whether this loss amounts to a cognizable element of damage proximately caused by the

Defendants' alleged violation of the Plaintiff's First Amendment rights is a genuine issue of material fact which may not be resolved on summary judgment. See Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1989) (consequential damages which would be recognized at common-law tort action are recoverable in civil rights action).

XIV. Conclusion

The Plaintiff's Motion for Summary Judgment is hereby **DENIED**. The Defendant's Motion for Summary Judgment is hereby **DENIED** with respect to the Plaintiff's First Amendment claim, and **GRANTED** in all other respects.

IT IS SO ORDERED this 25th day of August, 1994.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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|---|---|---|
| JERRY SHINAULT | ) | |
| | ) | |
| Plaintiff - Appellee, Cross Appellant, | ) | |
| | ) | |
| v. | ) | No. 94-6318 |
| | ) | No. 94-6354 |
| THE CLEVELAND COUNTY BOARD OF COUNTY COMMISSIONERS, a Political Subdivision of the State of Oklahoma; GEORGE SKINNER, County Commissioner, as public officer in his official capacity, and in his individual capacity; LEROY KROHMER, JAN COLLINS, County Commissioners, as public officers in their official capacities. | ) | |
| | ) | |
| Defendants - Appellants, Cross-Appellees. | ) | |

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ORDER
Entered May 30, 1996

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Before ANDERSON, TACHA, and BALDOCK, Circuit Judges.

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This matters comes on for consideration of appellants/cross-appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of this panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: Opal A. Carter
Deputy Clerk

## BRIEF OF DEFENDANTS-APPELLANTS/ CROSS-APPELLEES IN SUPPORT OF THIS COURT'S JURISDICTION IN LIGHT OF *JOHNSON V. JONES*, AND *SWINT V. CHAMBERS COUNTY COMM'N.*

### INTRODUCTION

This brief demonstrates why the court must exercise jurisdiction over the qualified immunity appeal of George Skinner, in his individual capacity, and why the court should exercise pendent appellate jurisdiction over the appeal of the other appellants.

### PROPOSITION I:

### GEORGE SKINNER'S APPEAL IS FROM A FINAL ORDER, AND MUST BE REVIEWED BY THIS COURT.

In *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), the United States Supreme Court held that public officials claiming qualified immunity have the right of immediate appeal from the denial of summary judgment where the issue concerns not which facts a party might be able to prove, but whether or not certain given facts show a violation of clearly established law. Summary judgment orders which determine only a question of evidence sufficiency are not appealable. On the other hand, a trial

court's determination that a given set of facts violates clearly established law must be reviewed. ___ U.S. at ___, 115 S.Ct. at 2159, 132 L.Ed.2d at 250.

Although *Johnson v. Jones* technically overruled Tenth Circuit precedent,[1] it did not reverse Tenth Circuit practice. Before *Johnson v. Jones*, this Court assumed that it had jurisdiction to determine qualified immunity appeals such as was present in *Johnson v. Jones*, but routinely affirmed denials of summary judgment motions based upon the existence of a material factual dispute. See, e.g., *Butler v. City of Norman*, 992 F.2d 1053 (10th Cir. 1993); *Walters v. Western State Hospital*, 864 F.2d 695 (10th Cir. 1988). See also *Campbell v. Mercer*, 926 F.2d 990, 992 (10th Cir. 1991); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988). Indeed, *Austin v. Hamilton*, the case specifically referred to in *Johnson*, was itself such a case.

The *Johnson v. Jones* holding was no radical departure from

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[1] The Court overruled *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991). See *Johnson v. Jones*, ___ U.S. at ___, 115 S.Ct. at 2154, 132 L.Ed.2d at 244.

prior precedent. In a post-*Johnson v. Jones* decision, this court succinctly set forth the framework for reviewing qualified immunity claims in a summary judgment context:

> First the defendant must adequately raise the defense of qualified immunity. Then the plaintiff must show that the law was clearly established when the alleged violation occurred and must present facts or allegations sufficient to show that the official violated the law. The defendant then has the usual summary judgment burden of establishing that there is no genuine controversy over a material fact which would defeat his claim for qualified immunity and that he is entitled to judgment as a matter of law.

*Thompson v. City of Lawrence, Kansas*, 58 F.3d 1511, 1515 (10th Cir. 1995). In *Johnson v. Jones*, the Supreme Court merely clarified that appellate courts do not determine factual disputes, a practice which most circuits, including this one, already followed.

The dictates of *Johnson v. Jones* are aimed primarily at excessive force cases. Material factual disputes often arise in these cases because of the very nature of the claims. This is so because "in excessive force cases the substantive inquiry that decides whether the force exerted by the police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified

immunity defense is available to the government actor." *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991). That is, the standard for qualified immunity under the Fourth Amendment is the same as the substantive standard. See, e.g., *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994); *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993); *Zuchel v. Spinharney*, 890 F.2d 273 (10th Cir. 1989). Both *Johnson v. Jones* and *Sevier v. City of Lawrence, Kansas*, ___ F.3d ___ (10th Cir. 1995), were Fourth Amendment excessive force cases.

By contrast, the issue in this First Amendment public employment case is whether, based upon "the facts that the district court assumed when it denied summary judgment," *Johnson v. Jones*, ____ U.S. at _____, 115 S.Ct. at 2159, 132 L.Ed.2d at 250, the law was clearly established such that George Skinner would have reasonably understood that what he was doing violated the law. *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988), quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523, 531 (1987). Unlike the situation in *Johnson v. Jones* or *Sevier v. City of Lawrence, Kansas*, this court is not called upon to review factual determinations. All that

this appeal asks the court to do is to assume the facts that the trial court assumed, and to determine whether those facts state a violation of clearly established law. Cf. *Romero v. Board of County Comm'rs of the County of Lake*, ___ F.3d ___ (10th Cir. 1995).[2]

Appellants' briefs identifies the undisputed material facts. See brief at 7-9. Furthermore, as appellants' reply brief made quite clear, what disputes exist are immaterial. This appeal does not raise questions concerning the facts as the trial court viewed them.

Part I of the trial court's order denying qualified immunity, see Order of August 25, 1994, at 1-9, contains the facts as the trial court viewed them. For purposes of this appeal, appellants have no disagreement with those findings. The only issue which the appeal raises is whether those facts, as the trial court assumed, showed the violation of clearly established law. That is precisely the type of issue

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[2] Despite the trial court's characterization of its denial of summary judgment based on material factual disputes, the Tenth Circuit in *Romero* reversed, analyzing the undisputed facts under the appropriate legal standard. According to the court clerk, the petition for rehearing in this case is being denied on August 22, 1995.

which *Mitchell v. Forsyth*,[3] *Harlow v. Fitzgerald*,[4] *Johnson v. Jones*, and all of the other qualified immunity cases uniformly hold is appealable.

The trial court's order clarifies that the purportedly protected conduct was Shinault's "running against Defendant Skinner in the 1990 Democratic primary [and] his prior support of Neil Steely, who was defendant Krohmer's political opponent in the 1986 and 1990 elections." The undisputed facts show that George Skinner, who took office in 1991, hired plaintiff for the first time in 1991, after the election in which plaintiff supported Krohmer's opponent, and after the election where Skinner defeated plaintiff. Indeed, Skinner gave Shinault the highest unelected job in his district, that of road foreman. **This happened after all of the purportedly protected conduct had occurred.**

Political patronage claims cannot exist where there is no nexus between protected political activities and the adverse employment

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[3] 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

[4] 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

action. Here, there is no evidence of such a nexus.

According to the undisputed facts, it was not until the late summer of 1991, more than half a year after Skinner first hired Shinault, and virtually a full year after the purportedly protected conduct had occurred, that problems arose. This situation is wholly unlike any of the leading political patronage cases, where the adverse action comes almost immediately after the protected conduct or after the inauguration of the new official. See, e.g., *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (discharge of employees because of current party registration); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) (newly appointed official discharges assistants because they lack support of Democratic Party); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (newly elected sheriff fires employees not affiliated with Democratic Party); *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990) (newly elected prosecutor fires supporters of his opponent). Here, by contrast, the adverse employment action took place a year or more after the last of the purportedly protected conduct, and after an intervening hiring, promotion and pay raise were

given to the plaintiff.

The United States Supreme Court has held that an employee, having once engaged in protected conduct, "ought not to be able . . . to prevent his employer from assessing his performance record and reaching a decision [to terminate] on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 286, 97 S.Ct. 568, 575, 50 L.Ed.2d 471, 483 (1977). In this case, George Skinner, weighing significant evidence of violation of county policy by Shinault, determined that plaintiff had not performed his job up to the appropriate standard. As the United States Supreme Court recently stated:

> [W]here the government is acting as employer, its sufficiency concerns should, as we discussed above, be assigned a greater value.

*Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1888, 128 L.Ed.2d 686, 699-700 (1994). The United States Supreme Court has long held that governmental employers have obvious and substantial interest in conditioning public employment upon meritorious performance. *Connick v. Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684,

1691, 75 L.Ed.2d 708, 721 (1983). This is precisely what George Skinner did.

There was absolutely no evidence that conduct protected under the First Amendment was a substantial or motivating factor in the termination. *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576, 50 L.Ed.2d at 484. There was, simply, no nexus between the purportedly protected conduct and the termination.

The trial court's error was in assuming that a termination subsequent to protected conduct *ipso facto* equals a First Amendment violation. Such is plainly not the law.

Although it cited *Wagner v. Wheeler*, 13 F.3d 86 (4th Cir. 1993), the trial court's order failed to consider the Fourth Circuit's holding in that case that "temporal proximity, however, is simply too slender a reed on which to rest a Section 1983 retaliatory discharge claim." 13 F.3d at 91. Furthermore, the other cases cited by the trial court concerning the significance of the sequence of events also prove Skinner's entitlement to qualified immunity. The first case concerned an employee who had been fired **two hours** after requesting a pay raise pursuant to the Equal Pay Act. *Love v. RE/MAX of America,*

*Inc.*, 738 F.2d 383, 386 (10th Cir. 1984). The second case concerned layoffs which occurred only **two months** after plaintiffs had negotiated a Title VII settlement. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir. 1986). Neither of these cases involved the First Amendment. Neither of these cases involve a time period anywhere close to as long as that involved here.

The existence of an Equal Pay Act and a Title VII case, with time lapses of only two hours and two months, respectively, does not put a reasonable County Commissioner on notice that he cannot terminate an employee for misconduct one year after the purportedly protected conduct under the First Amendment took place.

The First Amendment surely does not reach so far as to insulate an employee from termination for misuse of county property simply by virtue of his one time prior political activities. To the contrary, it seems wholly unreasonable to assume that a trier of fact could infer that plaintiff was singled out for termination because of protected conduct when 1. one year had passed, 2. plaintiff had been given a new job, 3. plaintiff had received a significantly higher salary, and 4. plaintiff had received a promotion.

This is not a case about evidence sufficiency. Under the undisputed, indeed indisputable, material facts, there was no First Amendment violation. Cf. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). And there certainly was no violation of clearly established law. There has been no Supreme Court or Tenth Circuit decision on point. *Trigalet v. Young*, 54 F.3d 645 (10th Cir. 1995); *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995). And there is no clearly established weight of authority from other courts finding the law as plaintiff maintains. *Warner v. Grand County*, 57 F.3d 962, 964 (10th Cir. 1995), quoting *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

Under the First Amendment, qualified immunity should be particularly difficult for plaintiff to defeat. See, e.g., *Wulf v. City of Wichita*, 883 F.2d 842, 864 (10th Cir. 1989); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992). Because the issue on appeal concerns not the sufficiency of the evidence, but instead a determination of the legal standard used by the district court, this court must decide this case. Because under the First Amendment there was no violation, and because the law was certainly not clearly

established that there was a violation, this court should grant George Skinner his qualified immunity.

**PROPOSITION II:**

**THIS IS THE CLASSIC CASE FOR THE EXERCISE OF PENDENT APPELLATE JURISDICTION.**

In *Moore v. City of Wynnewood*, 57 F.3d 924 (10th Cir. 1995), this court held that where a ruling on qualified immunity fully disposes of pendent issues related to those raised by the proper appeal, the court can exercise pendent appellate jurisdiction. See *Sevier v. City of Lawrence, Kansas*, ___ F.3d ____ (10th Cir. 1995). The *Wynnewood* holding is particularly apt here, because it involved a virtually identical setting.

In *Wynnewood*, the second in command sued the first in command and the governmental entity for alleged First Amendment deprivations in connection with his employment. He also brought pendent state law claims. The trial court denied qualified immunity. The individual defendant, the chief of police, appealed the denial of qualified immunity. The City also appealed under the doctrine of pendent appellate jurisdiction.

The issue in both appeals in *Wynnewood* boiled down to whether there was a violation of the First Amendment at all. This determination was relevant to the qualified immunity appeal because, under the holding of *Siegert v. Gilley*, the threshold question on qualified immunity is whether plaintiff has properly asserted a violation of a constitutional right at all. See also *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994); *Bisbee v. Bey*, 39 F.3d 1096 (10th Cir. 1994), *cert. den'd*, ___ U.S. ___, 115 S.Ct. 2577, 132 L.Ed.2d 827 (1995); *Martinez v. Mafchir*, 35 F.3d 1486 (10th Cir. 1994). The same determination disposed of the claim against the entity as well.

In *Wynnewood*, the court stated:

> We also exercise pendent appellate jurisdiction over the City's interlocutory appeal because our ruling that Moore has failed to establish a First Amendment Claim disposes of Moore's claims against the City . . . .

57 F.3d at 927. This was so because "the otherwise non-appealable decision is 'inextricably intertwined' with the appealable decision . . . ." 57 F.3d at 930, quoting *Swint v. Chambers County Comm'n.*, ___ U.S. ___, 115 S.Ct. 1203, 1212, 131 L.Ed.2d 60, 75 (1995).

The setting in this case is virtually identical to the setting in *Wynnewood*. As was true in *Wynnewood*, the pendent appellate claims of the defendants here are "coterminous with, or subsumed in, the claim before the court on interlocutory appeal -- that is, [] the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." 57 F.3d at 930. Here, George Skinner is entitled to qualified immunity because there was no First Amendment violation at all. Both the qualified immunity and the First Amendment appeals involve precisely the same question. Both require resolution of whether there was a violation of a constitutional right at all. If the court finds that plaintiff has not established the deprivation of his First Amendment rights, both appeals come to an end. The resolution of the one appeal *ipso facto* resolves the other.

The court has before it a fully developed record with fully briefed legal issues. Judicial economy will be enhanced by deciding all issues raised in appellants' appeals. The court has before it an ample record to allow final disposition.

## CONCLUSION

Appellants request that this court 1. determine that George

Skinner is entitled to qualified immunity, 2. exercise pendent jurisdiction over appellants' other claims on appeal regarding the First Amendment, and 3. reverse the trial court's decision, thereby finding that appellants did not deprive plaintiff of his First Amendment rights.

Respectfully submitted,

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**[FRINCIPLE BRIEF OF APPELLANTS/CROSS-APPELLEES]**

**SUBJECT MATTER JURISDICTION**

Pursuant to 28 U.S.C. § 1331, a district court has original jurisdiction over any civil action arising under the Constitution or laws of the United States. Invoking 42 U.S.C. § 1983, appellee Jerry Shinault ("Shinault") alleged that appellants, Board of County Commissioners of the County of Cleveland ("Cleveland County"), George Skinner, Leroy Krohmer and Jan Collins,[5] deprived him of liberty and property without due process, of his rights under the First Amendment, and of his rights to the equal protection of the laws under the Fourteenth Amendment. Appellee also brought claims of conspiracy under 42 U.S.C. § 1985 and pendent state law claims for malicious prosecution, defamation and the infliction of emotional distress.

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[5] Krohmer and Collins were sued only in their official capacities. Aplt.App. at 1, 359. Therefore, the claims against them, and the claim against Skinner in his official capacity, are in reality claims against Cleveland County. See *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Thus, this brief generally refers only to the two real defendants/appellants: Cleveland County and George Skinner.

On August 25, 1994, the district court granted summary judgment to all defendants as to all claims except for the claims under the First Amendment. The court denied defendants' motion for summary judgment under the First Amendment, and denied qualified immunity to George Skinner.

A district court's denial of a claim of qualified immunity is an immediately appealable final decision within the meaning of 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Appellants also assert that this court should exercise pendent appellate jurisdiction over the appeal of Cleveland County regarding the denial of summary judgment under the First Amendment. See *Swint v. Chambers County Commission*, ___ U.S. ___, 115 S.Ct. 1203, ___ L.Ed. ___ (1995); *Lankford v. City of Hobart*, 27 F.3d 477, 478-79 (10th Cir. 1994); *Robinson v. Volkswagenwerk AG.*, 940 F.2d 1369, 1374 (10th Cir. 1991), *cert. denied sub nom. Herzfeld & Rubin v. Robinson*, 502 U.S. 1091, 112 S.Ct. 1160, 117 L.Ed.2d 408 (1992).

**ISSUES FOR REVIEW**

1. Whether the trial court erred in denying Skinner's

motion for summary judgment regarding plaintiff's claims under the First Amendment.

2. Whether the trial court erred in denying Cleveland County's motion for summary judgment regarding plaintiff's First Amendment claims.

3. Whether Skinner is entitled to qualified immunity.

4. Whether pendent appellate jurisdiction is available to review the appeal of Cleveland County.

## STATEMENT OF THE CASE

Shinault filed claims under 42 U.S.C. § 1983 alleging deprivation of rights under the First and Fourteenth Amendments to the Constitution of the United States, as well as claims under various other federal and state law theories. The only claim pertinent to this appeal is Shinault's allegation that he was deprived of his First Amendment rights when he was terminated from his employment with Cleveland County.

This case proceeded through the normal channels of litigation. On August 25, 1994, the trial court granted summary judgment to all defendants on all claims, except plaintiff's claims under the First

Amendment. The trial court denied summary judgment under the First Amendment, and denied qualified immunity to Mr. Skinner. Defendants filed their notice of appeal on August 31, 1994.

## STATEMENT OF THE FACTS

This case arises out of the termination from employment of appellee/cross-appellant, Jerry Shinault, from his position as Cleveland County District 2 road foreman. Until 1990, Shinault had been an employee of Cleveland County District 3. Aplt.App. at 97, 101. In 1990, he ran for the position of County Commissioner for Cleveland County District No. 2. Aplt.App. at 95, 113, 216. He lost in a three way Democratic primary. George Skinner, appellant/cross-appellee, won the primary and subsequent run off, and was elected as the District 2 County Commissioner. Aplt.App. at 216. He took office at the beginning of 1991.

After he assumed office, Skinner offered a job to Jerry Shinault, his former political opponent. Skinner asked Shinault to become the District 2 road foreman. Aplt.App. at 112, 113, 114. Shinault accepted this job. Aplt.App. at 114.

The road foreman's position was a new job for Shinault.[6] It is the number 2 job in rank, just behind the County Commissioner. It is essentially the top unelective position. The road foreman's position constituted both a significant promotion and a significant pay raise over the job Shinault had previously held with District 3. Aplt.App. at 253, 254. Skinner was under no obligation to offer Shinault any employment whatsoever. In fact, Shinault had not been an employee of District 2 until Skinner offered him the job. Aplt.App. at 111, 112. Shinault began his new job in January, 1991. Aplt.App. at 111.

In July, 1991, Skinner held a meeting with Shinault to discuss the rumors Skinner had heard that District 2 employees were using county equipment on private property without authorization. Skinner and Shinault discussed the fact that it was improper for a county employee to use county equipment, funds or materials on private property. Aplt.App. at 72. Skinner told Shinault that he intended to have a meeting with all District 2 employees to discuss the policy. Aplt.App. at 72.

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[6] He had previously served as an temporary road foreman for District 3. Aplt.App. at 102, 103.

The next day, Skinner met with Shinault and all District 2 employees, and stated that it was improper and unlawful for a county employee to use county equipment, funds or materials on private property. Aplt.App. at 72. Shinault was present for this meeting. Aplt.App. at 164, 165.

On August 25, 1991, Skinner received a telephone call from Leroy Krohmer, District 3 County Commissioner. Krohmer told Skinner that he had received telephone calls from two citizens complaining that the driveway of a county employee had been oiled and chipped with county equipment. Krohmer was aware that District 2 had just completed an oil and chip job for the Little Axe School District (the "Little Axe project"), located within District 2. Aplt.App. at 288. Skinner and Krohmer drove by the Little Axe project and discovered that the driveway of James Bruesch, a county employee, had been freshly oiled and chipped. Bruesch's driveway lies within District 2.

After observing the site, Skinner contacted his personal attorney to discuss the matter. Skinner and his attorney again drove by Bruesch's house. They then called and requested that the foreman,

Jerry Shinault, meet with them. Aplt.App. at 73. Shinault admitted that he was aware that county employees oiled and chipped Bruesch's driveway with county equipment, and stated that he had even been present when it was done. Aplt.App. at 73, 152.

The next day, on August 26, 1991, Skinner reported his findings to the Cleveland County District Attorney's office. By law, the District Attorney is the County Commission's legal adviser. Okla.Stat.tit. 19, § 215.5 (1991). Skinner had no further involvement in the matter, other than (a) to terminate plaintiff's employment on the advice of counsel, and (b) thereafter to testify in court proceedings as a witness.

The Cleveland County District Attorney's office instituted an investigation of plaintiff and other employees involved in the driveway incident. Aplt.App. at 296. A District Attorney's investigator met with several county employees who had been present during the incident, and with the school district officials responsible for their end of the job. Aplt.App. at 299. He also interviewed Bruesch, who admitted that he had allowed county employees to use county equipment to oil and chip his driveway. Aplt.App. at 299.

Furthermore, he interviewed Shinault, who also admitted that he had been present, and stated that he did not stop his employees from applying the oil and chip to Bruesch's driveway. Aplt.App. at 299. The investigation even revealed that plaintiff may have directed county employees to oil and chip Bruesch's driveway. Aplt.App. at 299.

Shinault's employees stated that they knew that Shinault's intended use of the county equipment on Bruesch's driveway was a violation of county policy. Aplt.App. at 302, 304. They also stated that they were afraid either to object or to refuse to participate in the oiling and chipping of Bruesch's driveway altogether. Aplt.App. at 302, 304.

Because there was reason to believe that county equipment had been misused by District 2 employees, which constituted a violation of county policy, disciplinary action was taken against Shinault, Bruesch and another individual. Aplt.App. at 73. The District Attorney advised Skinner that it was appropriate to terminate Shinault's employment because of his participation in the misuse of county equipment. Aplt.App. at 73. Bruesch was also disciplined by Skinner, who suspended him without pay. Another employee received

a severe reprimand. Aplt.App. at 73.

Shinault's employment was terminated in September, 1991. Aplt.App. at 73. Subsequently, the State of Oklahoma pressed criminal charges against both Shinault and Bruesch, filing the criminal complaints on November 7, 1991. Aplt.App. at 7. On February 4, 1992, Bruesch pleaded guilty to a misdemeanor charge of misusing county equipment. Aplt.App. at 8. Shinault pleaded not guilty to a charge of embezzlement, and was tried before a jury. On May 20, 1992, the jury found Shinault not guilty. Aplt.App. at 8.

## LEGAL DISCUSSION

### STANDARD OF REVIEW

When reviewing an order denying summary judgment, the court reviews the entire record *de novo*. In other words, the appellate court "applies the same standard employed by the trial court under Fed.R.Civ.P. 56(c)." *Considine v. Board of County Commissioners*, 910 F.2d 695, 699 (10th Cir. 1990).

Summary judgment is appropriate when there is but one reasonable conclusion as to the material facts, and, as a matter of law, the movant is entitled to judgment. *Anderson v. Liberty Lobby, Inc.*

477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986), quoting Fed.R.Civ.P. 1. As appellants' brief shows, summary judgment should have been granted in their favor.

## PROPOSITION I:

## DEFENDANTS DID NOT DEPRIVE PLAINTIFF OF HIS FIRST AMENDMENT RIGHTS.[7]

### A. The Standard for Reviewing First Amendment Public Employment Claims.

The First Amendment safeguards two interests of a public employee: (1) the right of association; and (2) the right to speak on matters of public concern. *Langley v. Adams County*, 987 F.2d 1473

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[7] The standard of review in *de novo*. *Considine v. Board of County Commissioners*, 910 F.2d 695, 699 (10th Cir. 1990). These issues were raised in defendants' motion for summary judgment. Aplt.App. at 53-55. The trial court denied this portion of the summary judgment motion. Aplt.App. at 374-376, 389.

(10th Cir. 1993). To protect the right of association, the First Amendment prohibits a public employer from making promotions, transfers, layoffs and recalls based upon an employee's political affiliation. See, e.g., *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). To protect the right of free speech, the First Amendment prohibits a public employer from terminating an employee whose speech touches on a matter of public concern which is not outweighed by the employer's interest in the smooth functioning of the work place. See, e.g., *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). It is the first of these interests which is at issue here.

**B. The Material Facts.**

According to the trial court's order, the activity purportedly protected by the First Amendment was Shinault's "running against Defendant Skinner in the 1990 Democratic primary, [and] his prior support of Neil Steely, who was defendant Krohmer's political opponent in the 1986 and 1990 elections." Aplt.App. at 374, 375,

376. The complaint had alleged that Shinault intended to run for county commissioner in the future, and otherwise contained general allegations of deprivation of First Amendment rights. At his deposition, however, Shinault admitted that he neither said nor was about to say something publicly that caused defendants to terminate his employment. He also admitted that he was not intending to run for office in 1994 or beyond, and that he never told anyone that he intended to run. And he admitted that he was not prohibited from assembling with anyone. Aplt.App. at 218-222, 352, 353, 378, 379. Thus, the only issue involved in the court's ruling was Shinault's 1990 campaign and prior support of Neil Steely. Aplt.App. at 374, 375, 376.

In this case, the undisputed facts show that George Skinner, who first took office in 1991, **hired plaintiff for the first time in 1991. This was after all of the allegedly protected conduct had taken place.** This was **after** Skinner had defeated Shinault in the Democratic primary for Cleveland County Commissioner, District No. 2.

Skinner did not hire Shinault to just any job. Skinner gave

Shinault the highest unelected job in District 2, that of road foreman. And he did this long after all the protected conduct took place. This was the highest ranking and highest paying job Jerry Shinault ever had with Cleveland County.

It was not until the summer of 1991, **a half year after Skinner first hired Shinault and one year after the purportedly protected conduct had taken place**, that problems arose. Skinner learned that employees had been using county equipment and materials on the private property of county employees. Skinner told his employees not to do this. Despite Skinner's warnings, Jerry Shinault, Skinner's second in command, allowed or directed such activity. The final straw was the August 25, 1991, incident of oiling and chipping employee Bruesch's property. This was the straw that broke the camel's back.

Skinner did what any employer would have done. He held the supervisor, who allowed this activity to continue, responsible for his own actions. Upon the advice of counsel, Skinner terminated Shinault's employment.

**C. There is No Nexus Between the Purportedly Protected**

**Conduct and the Termination from Employment.**

Under the First Amendment, a plaintiff must present precise evidence of purportedly protected conduct with a degree of specificity that will provide the fact finder the basis for a proper determination whether that conduct or speech was the cause of the termination. *Hullman v. Board of Trustees of Pratt Community College*, 950 F.2d 665 (10th Cir. 1991). Furthermore, plaintiff must show that the conduct was a substantial or motivating factor in the termination. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Copp v. Unified School District # 501*, 882 F.2d 1547 (10th Cir. 1989). Here, plaintiff presented no such evidence.

The undisputed facts show that George Skinner hired plaintiff **after** plaintiff had unsuccessfully campaigned against Skinner. Skinner hired plaintiff **after** Shinault had unsuccessfully supported Leroy Krohmer's opponent, Neil Steely. Skinner was under no obligation whatsoever to make a job offer to plaintiff in the first place. But he did so, long after the supposedly protected conduct had occurred.

It makes no sense that Skinner would hire his former opponent, and then, eight months later, fire him because of his former political activity. The only thing that Shinault did that has any nexus with his termination was his deficient job performance. Any other conclusion strains the credulity of the court.

In *Cranford v. Moore*, 587 F.Supp. 712 (M.D.N.C. 1984), the court faced a similar situation. As was true there, "plaintiff's case depends on finding that it is fair and reasonable to infer that his termination was substantially motivated by [protected conduct engaged in] some two to four months earlier." 587 F.Supp. at 717. In *Cranford*, the court held that the nexus between the protected conduct and the termination was so tenuous as to the strain the credulity of the court.

Here, too, there is no evidence that the protected conduct was a substantial or motivating factor in the adverse employment decision. Cf. *McEvoy v. Shoemaker*, 882 F.2d 463 (10th Cir. 1989); *Patrick v. Miller*, 953 F.2d 1240 (10th Cir. 1992). Of course, plaintiff always has the burden of proving that his protected activity was a substantial or motivating factor in the adverse employment decision. *Copp v.*

*Unified School District No. 501.*

Furthermore, employers have the prerogative to remove employees when their conduct hinders the efficient operation of the business and interferes with close working relationships. *Seibert v. State, ex rel. University of Oklahoma Health Sciences Center*, 867 F.2d 591 (10th Cir. 1989). Only after the employee proves that the protected conduct was a substantial or motivating factor in the adverse employment decision does the burden shift to the employer to show that it would have reached the same decision in the absence of the protected conduct. In this case, there is no evidence that protected activity was a factor at all.

It is hard to see how a public official can be guilty of terminating an employee's employment in violation of the First Amendment when the allegedly protected activity occurred before the official had even hired the employee. That is precisely the case here. George Skinner did not inherit an employee who was a political opponent. He went out and hired his erstwhile political opponent to go to work for him. This case contains no evidence of a nexus between protected conduct and an adverse employment decision.

The one year lapse of time between the allegedly protected conduct and the termination alone ought to suffice to insulate defendants from any liability. The fact of the intervening new job, the new promotion, and the new salary increase between the time of the allegedly protected conduct and the termination also ought to suffice to insulate the defendants from exposure. It seems wholly unreasonable to assume that a trier of fact could infer that plaintiff was singled out for termination because of his protected political activity when (1) one year had passed, (2) plaintiff had been given a new job, (3) plaintiff had received a significantly higher salary, and (4) plaintiff had received a promotion.

Indeed, the trial court misplaced its emphasis on the timing of the events in this case. Although it cited *Wagner v. Wheeler*, 13 F.3d 86 (4th Cir. 1993), the trial court's order failed to consider the Fourth Circuit's holding there that "temporal proximity, however, is simply too slender a reed on which to rest a Section 1983 retaliatory discharge claim." 13 F.3d at 91. In *Wagner*, the purportedly protected conduct occurred less than 2 months before the termination. Here, an entire year intervened. Just as the Fourth Circuit reversed

and remanded the trial court's denial of summary judgment in *Wagner*, so too should this court reverse the trial court's order here. See also *Green v. St. Louis Housing Authority*, 911 F.2d 65, 71 (8th Cir. 1990) (coincidence of political opposition to mayor and subsequent termination provides no basis for First Amendment claim, especially when "facts" to support claim "rely primarily on gossip, speculation, and innuendo . . . .").

Public policy is ill served by the implications of the trial court's order. No successful candidate for office would ever extend such an olive branch to his former opponent if he knew that doing so meant that his new employee now and forever had an enforceable right to keep his job because of his prior protected activity. Whatever the scope of the First Amendment, surely it does not reach so far as to insulate an employee from termination for misuse of county property simply by virtue of his one time political activities. This is an absurd result which the First Amendment neither mandates nor supports.

This is not a case where the government has "condition[ed] public employment on political faith." *Elrod v. Burns*, 427 U.S. 347, 357, 96 S.Ct. 2673, 2682, 49 L.Ed.2d 547 (1976). If it were, Jerry

Shinault would never have become George Skinner's employee, much less his road foreman, in the first place. Nor can it be said that the termination occurred solely, *Branti v. Finkel*, 445 U.S. 507, 517, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980), significantly, or even at all for his purportedly protected conduct.

This termination occurred because of Shinault's deficient work. Cf. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74, 110 S.Ct. 2729, 2737, 111 L.Ed.2d 52 (1990). The dictum of *Connick v. Myers*, applies here:

> In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance. . . .

461 U.S. at 149, 103 S.Ct. at 1691, 75 L.Ed.2d 708.

Defendants presented uncontroverted evidence that they had reasonable grounds to terminate plaintiff's employment. The uncontroverted evidence shows that plaintiff not only was present for the misuse of county property, but also directed the very activity which violated county policy. Plaintiff was not similarly situated to any other employee. He was the supervisor. He was the man in charge. He was the person who bore full responsibility for the misuse

of county property.

Plaintiff carried with him no immunity from termination from employment simply because at one point he had held a contrary political position to that of his employer. As the Supreme Court has stated, an employee, by being once engaged in protected conduct, "ought not to be able . . . to prevent his employer from assessing his performance record and reaching a decision [to terminate] on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." *Mt. Healthy City School District v. Doyle*, 429 U.S. at 286, 97 S.Ct. at 575, 50 L.Ed.2d 471. The evidence was clear and undisputed that conduct protected under the First Amendment was not a substantial or motivating factor, or, for that matter, even a factor at all, in plaintiff's termination from employment.

On summary judgment, while all *reasonable* inferences should be drawn in favor of the non-moving party, the inferences must nonetheless be reasonable. In this case, looking at the evidence in the light most favorable to Jerry Shinault, and drawing all reasonable inferences in his favor, summary judgment nonetheless should have

been granted to defendants. Because there was no nexus between the purportedly protected activities and plaintiff's termination, judgment should be entered in favor of the defendants.

**PROPOSITION II:**

**SKINNER IS ENTITLED TO QUALIFIED IMMUNITY.**[8]

**A. The Qualified Immunity Standard.**

Once a defendant raises the defense of qualified immunity, plaintiff carries a heavy burden. "[P]laintiff must `come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred.'" *Langley v. Adams County*, 987 F.2d 1473, 1476 (10th Cir. 1993), quoting *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). "[P]laintiff must do more than identify in the abstract a clearly

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[8] This court "review[s] the district court's denial of qualified immunity on summary judgment de novo." *Romero v. Fay*, 45 F.2d 1472, 1475 (10th Cir. 1995). Skinner raised qualified immunity in his answer, Aplt.App. at 29-30, 33-34, and in his summary judgment motion. Aplt.App. at 14-16 The court denies this portion of Skinner's summary judgment motion. Aplt.App. at 374-376, 380-381, 389.

established right and allege that the defendant has violated it." *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d at 645. "The `contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.*, quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). "Unless such a showing is made, the defendant prevails." *Pueblo Neighborhood Health Centers*, 847 F.2d at 646. In other words, plaintiff must make a more "particularized showing." *Patrick v. Miller*, 952 F.2d at 1242. "Only after plaintiff has met this initial burden does the burden shift to defendants to prove that no genuine issue of material fact exists." *Gallegos v. City and County of Denver*, 984 F.2d 358, 361 (10th Cir. 1993).

Qualified immunity bars plaintiff from proceeding against a government official if his conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Qualified immunity protects all but "the plainly incompetent or those who knowingly violate the law."

*Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991), quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

The purpose of qualified immunity is to shield public officials from defending a lawsuit that fails to meet the qualified immunity test. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). Whether qualified immunity adheres is a matter of law to be decided at the earliest possible time. *Hunter v. Bryant*.

Plaintiff cannot merely state in a conclusional fashion that the law he claims defendant violated was clearly established. The right must be established in a more particularized and relevant sense. Plaintiff must demonstrate by specific, narrow facts that a specific right has been violated. *Weimer v. Schraeder*, 952 F.2d 336, 340 (10th Cir. 1991). The law is not clearly established unless "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Schalk v. Gallemore*, 906 F.2d 491, 499 (10th Cir. 1990), citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (emphasis in the original). In other words, the unlawfulness of

the specific action with respect to the specific claim must be apparent in light of preexisting law.

Once a defendant raises the shield of qualified immunity, the plaintiff bears a heavy burden. He must prove the existence of the clear law and its correspondence to the allegedly offensive conduct. *Weimer v. Schraeder*, 952 F.2d at 339; *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990). In meeting this burden, plaintiff must do more than merely identify a clearly established right in the abstract and claim that a defendant violated that right. *Pueblo Neighborhood Health Centers v. Losavio*. Of course, the court must determine in the first instance whether plaintiff has alleged a constitutional violation at all. If not, the defendant is immune. *Siegert v. Gilley*.

**B. George Skinner Did Not Violate Clearly Established Law.**

Under the First Amendment, qualified immunity is particularly difficult to defeat. *Wulf v. City of Wichita*, 883 F.2d 842, 864 (10th Cir. 1989). This is so because First Amendment cases are intensely fact specific. *Id.*; *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992); *Patrick v. Miller*, 953 F.2d 1240, 1243 (10th Cir. 1992).

George Skinner told all of his employees, including Jerry

Shinault, not to use county equipment on private property. Jerry Shinault violated that policy. He cannot now claim that his termination resulted not from the immediate problem of his conduct, but instead from some ancient, unrelated campaign.

It is not clearly established that a public official cannot terminate an employee for violating county policy and for misusing county property. It is not clearly established that a public official must refrain from terminating an employee because of one year old protected conduct which has no nexus to the termination. The law is not clearly established that a public official who hired an employee **after** the person engaged in protected conduct cannot thereafter subsequently terminate his employment. The law is certainly not clearly established that a public employer who promotes a public employee **after** the employee engaged in protected conduct cannot subsequently terminate his employment.

The truth of the matter is that not only was there no violation of clearly established law, there was no violation of the law whatsoever. Cf. *Siegert v. Gilley*; *Romero v. Fay*, 45 F.2d 1472, 1475 (10th Cir. 1995). And certainly George Skinner was entitled to

rely on the advice of his lawyer, the District Attorney, who fully advised him in this matter. Cf. *Cannon v. City and County of Denver*, 998 F.2d 867 (10th Cir. 1993); *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482 (10th Cir. 1990). Because the law was not clearly established, and because there was no violation of the law in any event, George Skinner is entitled to qualified immunity.

**PROPOSITION III:**

**THIS COURT SHOULD EXERCISE PENDENT APPELLATE JURISDICTION.**

Appellants adopt their previously filed memorandum of law concerning the reasons this court should exercise pendent appellate jurisdiction over Cleveland County's appeal. Since the filing of that memorandum, the United States Supreme Court has provided further elucidation on the subject of pendent appellate jurisdiction. See *Swint v. Chambers County Commission*, ____ U.S. ____, 115 S.Ct. 1203, ___ L.Ed.2d ___ (1995). The *Swint* decision demonstrates once again why pendent appellate jurisdiction should be exercised over the county's appeal in this case.

In *Swint*, the Court held that the Eleventh Circuit had

improperly exercised pendent appellate jurisdiction over an appeal by the Chambers County Commission regarding who made county policy. The Court held that the issue of who made policy was wholly unrelated to the issue of whether the federal right was clearly established. In so doing, the Court specifically reaffirmed that courts of appeals may have pendent appellate jurisdiction in appropriate cases, noting that it has not "universally required courts of appeals to confine review to the precise decision independently subject to appeal." 115 S.Ct. at 1211, citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 755-757, 106 S.Ct. 2169, 2175-2177, 90 L.Ed.2d 779 (1986).

Particularly important is the Court's emphasis on the fact that the parties never contended that "the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter." 115 S.Ct. at 1212. In this case, by contrast, the issues are identical. The question concerning the identity of the county's

policymaker, which may be important in some cases, is not at issue in this appeal.

The issues in both appeals here ultimately involve resolution of the question whether there was a violation of a constitutional right at all. Cf. *Martinez v. Mafchir*, 35 F.3d 1486, 1490 (10th Cir. 1994), citing *Siegert v. Gilley*, 500 U.S. at 231-232, 111 S.Ct. at 1792-1793, 114 L.Ed.2d 277. If the court finds, as appellants urge, that plaintiff has not established the deprivation of his rights under the First Amendment, both cases come to an end. Resolution of the one appeal *ipso facto* resolves the other appeal.

This is the textbook situation for the exercise of pendent appellate jurisdiction. It meets all the necessary factors. The facts are fully developed. They are before the court. The issues of law are fully briefed. The issues on appeal of both the collateral order and the other parts of the order are factually and legally intertwined. Indeed, they are identical.

To fulfill his burden of showing that Skinner is not entitled to qualified immunity, plaintiff must show that his termination violated the First Amendment. He is not entitled to relief as a matter of law if

he has not established a First Amendment violation. The same facts and law must be applied to plaintiff's claims against all defendants. Failure to establish the deprivation of a First Amendment right against Skinner's qualified immunity defense also fails to establish a claim against the County and the other defendants in their official capacities. Judicial economy will be served by deciding all the issues raised on appellants' appeal. The court may dispose of the entire case at one time. The record is more than ample to allow final resolution here.

## SUMMARY AND CONCLUSION

Plaintiff was terminated because he misused county property, violated county policy, and otherwise set an extremely poor example as the foreman of his crew. Plaintiff's termination was based on this conduct, not upon some long hence forgotten political battle. To the contrary, plaintiff was employed by Skinner as the District 2 road foreman after he had engaged in the purportedly protected conduct. Defendant Skinner gave plaintiff a pay raise after the purportedly protected conduct. Defendants should not be subjected to this continued litigation simply because the second in command had once run for county commission and now wanted to ignore his boss's

established policy and misuse county property. For the foregoing reasons, appellants request that the court reverse the order of the trial court, and direct it to enter judgment in defendants' favor on the First Amendment claims, as it had on all other claims, and to grant defendant Skinner qualified immunity.

## ORAL ARGUMENT

Oral argument is appropriate in this case to shed further light on the application of qualified immunity in the context of this First Amendment claim, to flesh out the issues regarding the requirement of a nexus between the purportedly protected conduct and the termination from employment, and to apply the recent United States Supreme Court decision in *Swint v. Chambers County Commission*.

Respectfully submitted,

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## ANSWER BRIEF OF APPELLEE

## JURISDICTIONAL STATEMENT OF APPELLEE

As indicated by the appellants, Board of County Commissioners of the County of Cleveland ("Cleveland County"), George Skinner, ("Skinner") Leroy Krohmer and Jan Collins, a district court has original jurisdiction over any civil action arising under the Constitution or laws of the United States, pursuant to 28 U.S.C. §1331. Invoking 42 U.S.C. §1983, appellee/counter-appellant Jerry Shinault ("Shinault") alleged that appellants deprived him of liberty and property interests without due process, deprivation of associational rights under the First Amendment, deprived him of his right to equal protection of the laws under the Fourteenth Amendment, and conspired to violate his civil rights under 42 U.S.C. §1985 as well as allegations of pendent state law claims.

On August 25, 1994, the district court granted summary judgment to the defendants as to all claims except for the plaintiffs claims under the First Amendment. The court denied defendants' motion for summary judgment under the First Amendment, and denied qualified immunity to the defendant Skinner.

The district courts denial of Skinner's claim of qualified immunity is an appealable decision within the meaning of 28 U.S.C. §1291. Importantly, when a stay is entered as in this case during such appeal, pending discovery disputes are also suspended. See, e. g., Shinault's Motion to Compel; Appellee's Supplementary Appendix, hereafter "Aplee.App.," Part 1.

Appellee again urges that this Court should not exercise pendent appellate jurisdiction over appellants' appeal of the trial court's denial of summary judgment of appellee's First Amendment claim, and has previously so argued by memorandum brief filed herein upon that issue as ordered by this Court. Appellee readopts arguments made in his memorandum brief regarding this issue.

## ISSUES FOR REVIEW OF APPELLANTS' APPEAL

Appellee agrees with Appellants' statement of the issues they seek for review. Appellee/Cross-Appellant's statement of issues of his appeal are contained within his Brief in Chief below.

## STATEMENT OF THE CASE

Shinault filed claims under 42 U.S.C. §1983 alleging deprivation of liberty and property interests without due process,

deprivation of associational rights under the First Amendment and deprivation of his right to equal protection of the laws under the Fourteenth Amendment. Additional claims were made under 42 U.S.C. §1985 for conspiracy to violate his civil rights as well as state law claims for malicious prosecution, defamation and intentional infliction of emotional distress.

The case proceeded through the normal channels of litigation. On August 25, 1994, the trial court granted summary judgment to all defendants on all claims except Shinault's First Amendment claim and also denied qualified immunity to defendant George Skinner. Defendants filed their notice of appeal on August 31, 1994, and Shinault filed his notice of appeal on September 26, 1994. Both appeals contain claims under pendent appellate jurisdiction.

On September 21, 1994, this Court ordered the parties to this appeal to submit memorandum briefs on this Court's pendant appellate jurisdiction. This Court reserved ruling on this matter, pending submission of briefs in chief.

## APPELLEE 'S RESPONSE TO APPELLANTS '

## STATEMENT OF THE FACTS

This case arises out of the termination from employment of appellee/cross-appellant, Jerry Shinault (hereinafter referred to as "Shinault" or "Appellee"), from his position as Cleveland County District 2 Road Foreman. Appellee agrees with the statement of facts of appellants in paragraphs one and two of their Brief (hereafter "Br.") at page 3, but with the following additions. Shinault had been an employee of District 3 from 1986 through 1990. Aplee.App. at 97, 101. Defendant George Skinner (hereinafter referred to as "Skinner"), along with his son-in-law and attorney Blake Virgin, after Shinault's defeat in a three man primary offered Shinault the job of District 2 Road Foreman *if* Shinault would lend Skinner his political support in Skinner's continuing campaign for county commissioner. Aplee.App. 253-256.

Appellee takes issue with appellants' statement of facts in paragraph three (Br. 3) in the following particulars. Shinault had previously been a road foreman in the county's District 3 for approximately 45 days at the end of the previous commissioners' term

in 1990. Appellants' Appendix, hereafter "Aplt.App.," at 102-103; and Aplee.App. at 128. While Skinner had no "legal obligation" to offer Shinault employment (as argued by appellants), he had nonetheless induced Shinault's campaign support by promising Shinault the job *if* Shinault assisted his campaign, which Shinault did. Aplt.App. at 253, cited by the appellants, does not support their statement of the "hiring" of appellee.

Appellee agrees with the appellants' statement of facts in paragraph four (Br. 3), but adds the following facts which appellants failed to include. Skinner *never* defined the term "private property"! Aplee.App. at 143. Additionally, there were numerous county exceptions to this policy. Aplee.App., 449-450 (lines 2-11). Most importantly, the county had used the James Bruesch property (the property Shinault was accused of violating "policy" by allowing use of county equipment to make repairs thereon) for years as an equipment park, and for years had used its own equipment, manpower *and materials* to effectuate repairs upon the very same Bruesch "private property." *See*, e.g., Aplee.App. at 249 (Skinner), 426-432, 446-447, 449-450 (lines 2-11) (Krohmer); 149-154 (Bruesch); and

142-147 (Shinault.)

Appellee disagrees with appellants' statement of facts in their fifth and sixth paragraphs of fact (Br. 4), and adds the following facts which appellants failed to include. Appellants' statement that the "driveway of a county employee had been oiled and chipped with county equipment," and that the oil and chip job for the Little Axe School District "had . . . been completed" was a disputed fact. Appellee contended that the Little Axe Project was not completed until the equipment was cleaned. Therefore, when the waste oil and chip (owned by the school) was dumped onto the Bruesch property -- so that the equipment could be cleaned -- the loaned equipment was still under the control of the Little Axe representative. In fact, Little Axe personnel "directed" the operation of the equipment and application of the materials involved during the paving project. Dr. Joe Work, Little Axe School Superintendent, testified that his employee Danny Smith was the agent in charge supervising the work for the school. Aplee.App. at 125 (Work); and at 392 and 393 (Skinner's sworn testimony in October, 1991). Customary operating practice followed by the county was that the borrowing entity had control of

the crew and equipment until the project was completed, the material disposed and the equipment cleaned and restored to operational condition and returned to the county. Aplee.App. 130-131; 474-475. Hence, Shinault did not believe that he had operating control over the school's material or the loaned equipment; and, therefore, he did not knowingly violate *any* county policy.

The Court should also note that whereas Krohmer had "reported" the incident, he intentionally refused to disclose the name of the two witnesses to appellee (Aplee.App. at 433-445), and stated that, but for this litigation, he would have never disclosed the complaining witnesses names to Shinault. Aplee.App. at 445. Additionally, there was direct evidence *that at all times* Krohmer knew of the "public nature" of the Bruesch property, because circa 1987-1990, Krohmer was in charge of easement procurement for the same District 2; he did not bother to obtain an easement regarding the Bruesch property because in his own words "it had been an accepted use for many years" and wasn't deemed necessary. Aplee.App. at 447-450. Skinner was also aware of the use of the Bruesch property by the county and had driven by the same on at least six occasions

prior to the allegations against Shinault. Aplee.App. at 223-224; and see also, 210-211. This is an admission that Skinner had "scienter" of the public use of the property at all times before and during the charge against Shinault, and is strong inferential evidence that the repeated public allegations (before and after Shinault's exoneration of the charge) was a subterfuge in order to retaliate against Shinault and ruin his public reputation. It was due to an alleged violation of the policy against the use of county equipment and property on "private property" that the appellants terminated appellee's public employment. Aplee.App. 246 (Skinner depo.); 502 (Gaston depo.); Aplt.App. 24-27 (newspaper articles of the violation of "public trust.") The alleged wrongful act that Shinault committed was his failure to stop or prevent the application of material, owned by another entity, using equipment that had been loaned to the school by the county. Aplee. App. at 246, 386-405. It was undisputed Shinault gained no personal benefit from the dumping of the waste oil onto the Bruesch property, which again had a long history of county usage, because it's u-245; 502-503. County personnel, equipment and material had often been used before upon the Bruesch property in what Krohmer described as

an "accepted use for many years" and *without any punitive action* against such other county employees. Aplee.App. at 149-154; 424-425; 429-431; 446; 448-450. This is strong evidence of selective prosecution against Shinault for an ulterior motive.

Appellee agrees with the appellants' statement in their seventh fact paragraph (Br. 4), but adds the following facts which appellants failed to include: At the time of the referenced conversation, Skinner made no charge against Shinault nor did he announce any adverse action against Shinault. Aplee.App. at 514.

Strangely, at that initial meeting (i.e. contemporaneous with the "investigation" of the charge of violating the policy of *not doing work on private property),* Skinner also forced Shinault to execute an affidavit, prepared by Blake Virgin, which stated Shinault had "not done any work" on Virgin's property at Skinner's direction. That affidavit was false. Shinault signed it fearing he would be fired if he declined. Aplt.App. at 144-151.

On the evening following that first meeting with Shinault, Skinner and his son-in-law, Blake Virgin, authored a press release published in the local newspaper in which Skinner said he requested

an investigation of the "misuse of county funds and materials" and was not going to tolerate any employee "playing fast and loose with county funds." Aplt.App. at 24; Aplee.App. at 239-241, 255.

Appellee generally agrees with the appellants' eighth fact paragraph (Br. 4), but disagrees with appellants' statement that Skinner had no further involvement in the matter except to terminate Shinault and to testify as a witness. It was Skinner who, as chief complaining witness, initiated proceedings to have Shinault prosecuted by the District Attorney's office for "embezzlement." Aplee.App. at 383.

Appellee also generally agrees with appellants' statement at their ninth fact paragraph (Br. 5), but disagrees that the investigation may have revealed that Shinault "may have directed county employees to oil and chip Bruesch's driveway." A close examination of Mr. Argo's investigatory report (particularly the summary) discloses a lack of any conclusion that Shinault directed county employees to oil and chip the Bruesch driveway, but rather only states Argo's opinion that Jerry Shinault was present on the Friday when the decision was made to send the remaining materials and equipment to James Bruesch's

drive. The fact that Shinault did not disapprove or stop the action would cause him to be a party to the action." Aplee.App. at 381 (Argo Report). The fact that the appellants weren't even sure if Shinault directed the paving of the Bruesch driveway suggests that they acted without the benefit of a complete investigation, and is additional, inferential evidence that appellants had an ulterior motive to terminate appellee. Importantly, Skinner -- in response to the administrative law judge's questions -- admitted under oath at Shinault's Oklahoma Employment Security Commission ("O.E.S.C.") hearing (months after Shinault's termination) that there were "conflicting stories" about who had approved the Bruesch overlay. Aplee.App. at 396-397. That hearing held Shinault did not intentionally violate any county policy or engage in misconduct. Aplee.App. at 182-184.

Additional facts to consider with reference to paragraph nine, which appellants failed to include, are as follows: Krohmer had previously requested a criminal investigation of Shinault by the Cleveland County District Attorney's office on January 17, 1991, the *same month* that Shinault was hired by Skinner. Skinner was aware of this investigation. That investigation cleared Shinault of any

wrongdoing. Aplee.App. at 350; see also, 351-357. After this "initial" criminal complaint against Shinault fizzled, Krohmer began the second charge by allegedly reporting to Skinner a citizen complaint about the Bruesch drive. Aplee.App. 432-440. Later, Krohmer would not allow the charge against Shinault to be dismissed although Assistant District Attorney Reg Gaston told a third party the charges could be dismissed "but for" Krohmer. Aplee.App. at 31.

Conversely, Argo's investigation of the Bruesch driveway incident described a clear case of *"theft of materials"* by Tommy Jones, who used county equipment and Little Axe materials from the same job and applied these materials on his driveway. Aplee.App. at 381. Jones (who it will be remembered is a cousin of Skinner's son-in-law Blake Virgin) was neither publicly mentioned in the press, nor suspended, nor terminated, nor made the onus of a criminal charge. Aplee.App. 234-236. At the O.E.S.C. hearing (10/22/91), Skinner was asked if "disciplinary action" was being taken against any other employee and he replied "no". Aplee.App. at 390. But all these negative consequences befell Mr. Shinault. Bruesch, who was charged and pleaded to a misdemeanor, was almost immediately rehired by

Skinner. Aplee.App. at 270-271. Shinault's selective prosecution for a less serious infraction than that done by Jones is more inferential evidence of a specific intent/plan to injure Shinault and his reputation.

That plan is further revealed by the county's post-charge conduct, to wit: Shinault was twice interviewed by Argo but was not given the Argo report, including witness interviews and photos, before his discharge from employment. In fact that report was totally withheld from Shinault until it was produced nearly two years later in this litigation. Aplee.App. at 315-340.

Appellee takes issue with appellants' unsubstantiated statement in their tenth fact paragraph (Br. 5). Appellee maintains that he never intended to do anything that represented a misuse of county property and further staunchly maintains that the paving of the Bruesch driveway was not a violation of county policy. Appellants also fail to mention to this Court that the coworkers' interviews (which were never disclosed to Shinault) themselves establish some of the numerous recognized exceptions to the "policy" that no work is to be done on private property. Aplee.App. 363-380. Even Skinner admitted that included among these recognized exceptions was that

the policy could be ignored if work on private property inured to the benefit of the county, or if "waste material" was being disposed. Aplee.App. at 220-222. Skinner admitted it was acceptable to place county owned gravel upon the Bruesch property where the graders were stored because "you have a right to do it, since they are letting you park that on their property". Aplee.App. at 224.

Appellee disputes appellants' eleventh fact paragraph (Br. 5) statement that there was "reason to believe" county equipment had been misused and constituted a violation of county policy. Both Skinner and Krohmer were aware of the use of the Bruesch property as a equipment storage facility for over 30 years and were aware of the exceptions for maintaining such property which directly benefitted the county. Chronologically, on August 30, 1991, Shinault took a week's planned vacation. Aplee.App. at 308, 515. When he returned on September 9, 1991, Skinner summoned Shinault to his office and "suspended" him 'until the investigation was complete". Aplee.App. at 251, 515-516. Sometime later in September, but before October 22, 1991 (the O.E.S.C. hearing) Skinner terminated Shinault in absentia. Aplee.App. at 287. Gaston testified that sometime before the

O.E.S.C. hearing, Skinner asked "can I fire Jerry Shinault. Aplee.App. at 504. Gaston replied affirmatively believing that Shinault was an "at will" employee and didn't require any due process. *Id.*

Appellee generally agrees with the appellants' statement in its twelfth paragraph (Br. 6), but in context of these criminal charges and prosecutions, adds the following facts which were omitted: On November 11, 1991 the Norman Transcript published an article that "embezzlement charges" were filed against Shinault and Bruesch. The article republished Skinner's August statements about "possible misuse of county funds." The article also stated that the criminal charge carried the possibility of a fine and jail time. Aplt.App. at 25. Immediately following Shinault's acquittal on May 20, 1992, Skinner again issued another press release, which was reported in the Norman Transcript and The Daily Oklahoman, and which stated that Skinner "would not reinstate Shinault despite the verdict" and that Shinault actions "were improper and a violation of the public trust." (Emphasis added.) Aplee.App. 26. Skinner refused to allow Shinault to return to work after acquittal. Id.

## APPELLEE'S STATEMENT OF THE FACTS

Since many of the cases' facts were covered by appellants, and disputed or supplemented above by appellee, appellee/cross-appellant for brevity adopts that detailed statement of facts contained within his Motion for Summary Judgment as per local (U.S.D.C., W.D. Okla.) Rule 14(b). See, Aplee.App. at 37-52. That motion is attached as part "2" of the Supplementary Appendix to this brief, and the factual support referenced in the motion is, also, included as Aplee.App., Part 3. Specific factual reference to this record will be made within the body of argument.

## ARGUMENT

### IA: NEXUS BETWEEN THE TERMINATION AND THE EXERCISE OF APPELLANT'S FIRST AMENDMENT RIGHTS HAS BEEN ESTABLISHED SUFFICIENT TO SATISFY THE REQUIREMENTS OF RULE 56.

Appellee filed his Complaint and included a cause of action for violation of his First Amendment rights. In paragraph 13 of the Complaint, appellee requested permission to amend the same at such time that other and further person(s) who acted in concert with Skinner in violating appellee's First Amendment rights may be

discovered. Appellee could not identify the name(s) of such other person(s) after exercise of due diligence pursuant to Rule 11 Fed.R.Civ.P. when he filed his Complaint. However, the allegation of animus directed toward the appellee, because of the exercise of his rights (i.e., of association) was explicitly pleaded. During the course of discovery, Krohmer failed to respond to questions propounded to him at his deposition concerning his activity with respect to appellee's First Amendment claim. Aplee.App. 1-31. Appellants now rest their appeal upon the basis that appellee cannot produce any direct or inferential evidence that the appellants violated his First Amendment rights.

Even absent complete discovery in the case below, there is ample evidence, as shown in appellee's statement of facts, that appellants violated appellee's First Amendment rights. Based upon these facts there is a very strong inference that Krohmer's conduct in repeatedly requesting or instigating investigations of appellee, in spreading untruths about the conduct as an employee to third persons, and the withholding of names of witnesses, was part of an overall scheme to "frame" Jerry Shinault, because appellee had supported

Krohmer's political opponent. This is supplemented by the trial court's recitation of facts which recite many events in the record showing disparate application of "policy." Aplt.App. at 364-367. The trial court correctly concluded this sequence of events, appellants knowledge of Shinault's protected activity, and the marked disparity of treatment is sufficient to present a genuine issue of material fact as to appellants' motivation. Aplt.App., 375-376.

Although Krohmer refused to answer questions asked of him at his deposition concerning why the fact that appellee campaigned for another candidate caused Krohmer's friendship with appellee to be impaired, he did respond briefly with a response that, taken in a light most favorable to appellee, would indicate that Krohmer did chill appellee's First Amendment right of association. Krohmer said "a lot of it is personal and I'm not going to go into it." Shinault's protected activity of political support has been precisely proved -- even by Krohmer's admissions. Skinner obviously acted in concert with Krohmer. Skinner's conduct could be viewed as unknowing of Krohmer's animus, even if he acted at Krohmer's insistence. Conversely, Skinner (even though he originally kept his promise and

hired Shinault for the latter's political support), had several motivations to act in full concert so as to discredit Shinault: if the paving of his son-in-law's driveway is discovered; if the public learns Skinner promised public jobs for political support (itself arguably illegal under Oklahoma law, *see*, 26 O.S.1991, §16-106), etc. Skinner had a stake in firing Shinault for "violating the public trust." By reasonable inference(s) at the very least, appellee's right to assemble with other citizens for political support of their candidacy or otherwise engage in political activity has been, and was, impaired by the actions of appellants. Krohmer's brief admissions before his response was halted shows a motivation occasioned by appellee's support of his political opponent, which motivation -- particularly in light of what the trial court called the "sequence of events" -- can reasonably be interpreted as a substantial or motivating factor in appellee's termination. Holm v. Board of Trustees of Pratt Community College, 950 F.2d 665 (10th Cir. 1991) does not require conclusive proof of the subjective intent for retaliation (that could never be accomplished), simply that the protected speech (or activity) be precisely identified. Here it has been specifically identified and is a type traditionally

protected against such retaliation. Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990).

**IIA: APPELLANTS SHOULD BE ESTOPPED TO ARGUE THAT THERE IS NO "NEXUS" BETWEEN THE PROTECTED CONDUCT AND THE TERMINATION FROM EMPLOYMENT, SINCE THESE SAME PARTIES HAVE REFUSED TO ALLOW FACT DISCOVERY TO PROVE OR AID IN PROOF OF THIS ISSUE.**

As stated in the previous proposition, appellants argued that appellee failed to present "precise evidence" that his First Amendment conduct was the cause of his termination, citing Holm v. Board of Trustees of Pratt Community College, 950 F.2d 665 (10th Cir. 1991). Appellants should be estopped and not heard to argue such lack of "precise evidence" before this court, since they failed, refused and neglected to allow proper deposition inquiry into these specific areas of proof. See, appellee's Motion to Compel, at Aplee.App, 1-31.

As stated in the said motion, the first three inquiries, to which answer was refused, would be answers which themselves tended to prove, or which would otherwise lead to discoverable evidence of, the nexus with more precision. And as further argued, Aplee.App. at 2, Shinault's Complaint (¶13) requested permission to amend at such

time as other persons who acted in concert with Skinner might be discovered. As the motion states, Krohmer testified at deposition he had initiated an investigation against Shinault on January 17, 1991. Cf. Aplee.App. at 350. Therefore, unlike appellants' argument at Br. 11, citing Wagner v. Wheeler, 13 F.3rd 86 (4th Cir. 1993), the county, per Krohmer, began investigating Shinault for improper conduct the very month he was hired by Skinner; this fact was known to Skinner.

Importantly, in his deposition (Aplee.App. at 17, line 20), Krohmer was specifically asked "why the fact that one person campaigned for one candidate would cause his friendship to be impaired?" Krohmer refused to answer that question. Appellee made the specific record he had a right to discover this information, because this same area of inquiry had been explored by counsel for defendants/appellants (showing its relevance to case issues).

Krohmer during his deposition continued his refusal to cooperate in discovery by refusing to answer any question about his discussions with attorney Reg Gaston concerning the prosecution of Shinault. Aplee.App at 21-22. Although the direct relevancy of these questions seems obvious, further *compare*, affidavit of Neil Steeley,

Aplee.App. 30-31). And, see *also*, affidavit of Harold Liddell. Aplee.App. at 27-28. Mr. Liddell's affidavit shows that during the year 1992 (Shinault was completely exonerated of the county's charges against him in May, 1992), Krohmer told Mr. Liddell that "you don't want Neil Steeley or Jerry Shinault involved (in a matter concerning Mr. Liddell's properties). They wouldn't have any creditably because we caught them stealing." (Emphasis added.) Aplee.App. at 28. Liddell's affidavit shows that Krohmer, in 1992, still connected Shinault with Steeley and stated to a disinterested third party that the county (or "we") had "caught them (Steeley and Shinault) stealing". Krohmer made the statement even though the Argo report showed on its face that Shinault was found to have done nothing wrong as against Krohmer's *initial* charges. *See*, Aplee.App. at 350-357.

In fact, Shinault had, in May, 1992, been cleared of any "stealing" by his successful defense of the criminal action. Appellants' Statement of Facts, Br. 6. And there was a *third* investigation that had been commenced at the time Mr. Shinault was terminated (the investigation was unknown to Shinault at the time) but which has never led to any charges or other action. Aplee.App. at 406-419.

Note: With less than nine months of service in Skinner's District No. 2, Shinault, who had a fine record for the previous four years with the county, had been investigated by the county three times, charged once (from which he was acquitted), and also terminated his employment (even though the Employment Security Commission had determined Shinault did not knowingly do anything wrong). Aplee.App. at 182-184.

Therefore, it must be logically presumed Krohmer was speaking to Liddell of the first investigation, (which Krohmer procured) or the investigation by virtue of which Shinault was terminated, but successfully defended and which conclusively showed that no "stealing" had been committed by Shinault. Accordingly, the first and second questions, which Krohmer refused or was directed not to answer, would have further explored the area of Shinault's alleged wrongdoing and how it may have connected to his admitted enmity against Shinault based upon Shinault's political support for certain candidates. Stated differently, the inference of undisputed fact is that one county official, Krohmer, *immediately began* a campaign to destroy Shinault's reputation; this campaign *continued* after

Shinault's termination. Aplee.App. at 27-28. Skinner knew of Krohmer's investigation, knew Krohmer instigated the charge which led to Shinault's termination, but was a willing ally for reasons that are explored in other propositions.

The third question Krohmer refused to answer was asked because of the direct evidence (per the statement contained in Mr. Steeley's affidavit) that Krohmer had used his official capacity to continue and maintain the criminal charge against Shinault. This would tend to prove that the criminal charge and the termination were a subterfuge designed to impair Shinault's good name and reputation (destroy his reputation), so that he could not thereafter himself run for office if he so desired or that he could not be an active, visible spokesman on behalf of others (i.e., since Shinault "had been caught stealing"). It was Shinault's political support "on behalf of others" that particularly agitated Mr. Krohmer. Aplee.App. at 17.

Appellee filed his Motion to Compel on May 26, 1994, but the trial court did not rule on same before it entered summary judgment on August 25, 1994. Appellee then immediately commenced this appeal before pretrial, where Shinault would -- at the latest -- have

pressed his pending motion to compel. Upon these premises it is obvious Shinault has not even been allowed to complete discovery before this Court is asked to reverse a trial court's refusal to grant these appellants summary judgment upon the First Amendment claims, rejecting their claims of lack of "precise" proof.

Rule 37(B)(2)(b & c), Fed.R.Civ.P., provides that if a party fails to obey an order to provide discovery, then any designated defense may not thereafter be supported, or judgement by default may be rendered against the disobedient party. Since the trial court was not even allowed opportunity to compel discovery prior to this appeal, and since the matters under inquiry directly relate to establishing not only a nexus between the protected conduct and the termination, but to identify other persons who might in fact be conspirators, the appellants' arguments at Br. 9, et seq., should not be heard. Rule 37, Fed.R.Civ.P.; cf., Orjias v. Stevenson, 31 F.3rd 995 (10th Cir. 1994).

In summary, such evidence would at the least help to establish (or better to buttress many other pieces of inferential evidence) the requested "precise proof" of ulterior motive to injure Mr. Shinault's reputation, to prevent his political involvement, support or

participation in the future -- the very essence of his First Amendment retaliation claim. Such information would further directly dispute the "temporal proximity" argument advanced at Br. 11. The information would aid the overall evidence, which already amply illustrates that Shinault's political involvement supporting Steeley and otherwise as stated in this brief was a "substantial" factor in his termination. It was certainly a motivating factor to cause Krohmer to instigate repeated, unfounded "investigations,' to which the D.A. and others responded to his official status.

Appellants, having refused to participate in good faith in discovery (and since appellee timely moved to compel under Rule 37), should not be heard to argue lack of evidence of a nexus in this appeal. And certainly not so in the context of what is a pendent appellant claim to overturn the trial court's denial of summary judgment upon the First Amendment allegations.

**IIIA: SKINNER'S CONDUCT VIOLATED A CLEARLY ESTABLISHED LAW OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN.**

A public official is not entitled to qualified immunity if his or her unlawfulness is apparent in light of preexisting law. Anderson v.

Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); Eastwood v. Dept. of Corrections of St. of Okla., 846 F.2d 627, 630 (10th Cir. 1988). The particular conduct at issue need not even have previously been held unlawful in order to be determined "clearly established". Eastwood, supra, 846 F.2d at 630 (quoting Anderson v. Creighton, 107 S.Ct. at 3039). Moreover, a strict factual correspondence between the cases establishing the law and the case at bar is not necessary. This Circuit requires "some but not precise factual correspondence." Id. Whether the federal right asserted was clearly established at a particular time is a question of law. Elder v. Holloway, 114 S.Ct. 1019, 1023 (1994). There is no question that the right to render support *in any form* in the political process is guaranteed under the First Amendment. In Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), the Supreme Court held that promotions, transfers and recalls based on political affiliation or support (appellants omitted this last, emphasized criteria) are an impermissible infringement upon the First Amendment rights of public employees. (Emphasis added.) There is strong, inferential evidence that appellants impermissibly retaliated against

appellee for exercising his First Amendment rights by firing him, inter alia, for his support of Krohmer's political opponent. Beginning with Krohmer's admitted enmity, appellants wanted to make sure appellee not only never again ran for office, but that his reputation would be so tarnished that he could never again support anyone who might possible run for office, especially against these incumbent commissioners. Judge Russell's finding of further inferential proof by the widely-disparate application of the purported "policy," buttresses this evidence. For these reasons appellee's evidence states a First Amendment claim.

Since 1972, the law has been clearly established that the government cannot deny a person benefits in retaliation for the exercise of First Amendment rights. See, Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972), where the Supreme Court stated:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally

protected interest -- especially, his interest in freedom of speech." Id.

The law prohibiting denial of government benefits based upon First Amendment retaliation was clearly established in this Circuit at the time Skinner began his pattern of retaliation in 1991. Abercrombie v. City of Catoosa, 896 F.2d 1228, 1233 (10th Cir. 1990). And the prohibition against denying government benefits based upon First Amendment retaliation is clearly established in the Tenth Circuit today. Umbehr v. McClure, 44 F.3d 876, 879, n.1 (10th Cir. 1995).

Skinner's and Cleveland County's unlawful retaliation against appellee for exercising his right to political association was clearly established at the time appellants' retaliation began post 1991. The law was clearly established by the Supreme Court's 1972 decision in Perry and this Circuit's 1990 decision in Abercrombie. It remains clearly established via the Tenth Circuit's 1995 decision in Umbehr.

**IVA: THIS COURT SHOULD NOT EXERCISE PENDENT APPELLATE JURISDICTION.**

Appellee/Counter-Appellant adopts his previously filed memorandum brief discussing why this Court should not exercise pendent appellate jurisdiction over the appellants' appeal. As

previously stated in said brief, if this Court decides to exercise pendent appellate jurisdiction as to the appellants, then the appellee should also be allowed to proceed upon pendent issues.

In response to appellants' argument that the recent decision in Swint v. Chambers County Commission, _U.S._, 115 S.Ct. 1203, _L.Ed.2d_ (1995) demonstrates that pendent appellate jurisdiction should be exercised over the county's appeal in this case. First, appellants' reliance upon this decision is misplaced based upon the particular facts in the instant case, which appellants ignore.

In Swint the Court held the Eleventh Circuit had improperly exercised pendent appellate jurisdiction over an appeal filed by a County Commission regarding the denial of it's motion for summary judgment. That appeal was bootstrapped onto the appeal of police officers over the issue of their qualified immunity from suit. The Court held that the Commission's appeal did not fit within the collateral order doctrine, nor was there pendent appellate authority to take up the Commission's case.

Swint, 115 S.Ct. at 1208, cited Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) for

the proposition that 28 U.S.C. §1291 permits pendent appeals in only a small category of decisions that are considered "final". That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, **and that are effectively unreviewable on appeal from the final judgment in the underlying action**. (Emphasis added.) This case simply does not fit into this small category of exceptions. Here, as in Swint, the appellants are trying to bootstrap their appeal based upon Skinner's claim of qualified immunity. What appellants ignore is the fact that the County acts as a separate and distinct body comprised of three individual commissioners, and that body is separate and distinct from the individual commissioners. Assuming, *arguendo*, that this Court resolves the issue of qualified immunity in favor of Skinner, a First Amendment claim can still be maintained against the County based upon the facts before the Court. Although Skinner is undoubtedly a player in the whole First Amendment claim, he is not the only party involved and a resolution of a qualified immunity issue in his favor would not by necessity absolve the County of liability. Sufficient inferential evidence to show a triable issue of fact with respect to

appellee's First Amendment claim exists against the County outside of the qualified immunity issue involving Skinner: it is beyond dispute that Krohmer, who had a personal animus against Shinault, initially instigated the paving charge by his "report" to Skinner but did not disclose that he had observed county employees working on the property for years and no one had been prosecuted.

Appellants urge that this is a "textbook example" for the exercise of pendent appellate jurisdiction. They claim that this case meets all the necessary factors for this Court to exercise pendent appellant jurisdiction, that the facts are fully developed and that they are before the Court. Appellants' argument based upon Swint is flawed for three reasons.

First, as was argued in "II," with regard to Shinault's First Amendment claim and, specifically, Krohmer's refusal to answer certain discovery questions, which bear directly on Shinault's First Amendment claim, facts are *not* fully developed nor before the Court.

Second, as the trial court noted, Shinault has come with sufficient evidence to raise a genuine issue of material fact as to the motivation of Skinner and Krohmer in discharging Shinault. The trial

court based this upon the evidence presented by Shinault as to the sequence of events leading up to his discharge, combined with the evidence of disparate treatment. The trial court further stated that when all the evidence is reviewed in a light most favorable to Shinault and all reasonable inferences drawn in his favor (as is the standard of review here), there was a genuine issue of material fact as to whether Shinault's protected political activity was a substantial or motivating factor in his termination. The trial court so found despite the fact that the issue of Krohmer s failure to respond to deposition questions from appellee had yet to be resolved by the trial court. Despite what appellants urge, appellee has established a First Amendment violation for purposes of Rule 56 and under Langely v. Adams County, 987 F.2d 477 (10th Cir. 1994). Appellee has met his Langley threshold burden by showing a violation by appellants of his clearly recognized and fundamental First Amendment rights. There is, as the trial court indicated, sufficient evidence to show a triable issue of fact. Skinner's qualified immunity is an issue distinct from the First Amendment claim of Shinault when considering the trial court's order referenced not only Skinner's, but Krohmer's, involvement in Shinault's termination.

Finally, appellants' statement that "Shinault must show that this termination violated the First Amendment to fulfill his burden of showing that Skinner is not entitled to qualified immunity" ignores the fact that a determination of whether a violation of it.

Shinault's First Amendment rights by the County occurred is a separate and distinct determination, driven by different facts (such as the degree and extent of complicity between Skinner and Krohmer), which facts are also not fully developed because of Krohmer's refusal to cooperate in discovery. Additionally, appellants statement ignores the fact that Shinault has met his threshold burden under Langley.

Appellants also fail to address the requirement in Cohen that the pendent appeal must be **effectively unreviewable** on appeal from the final judgment in the underlying action. An erroneous ruling on the issue of the County's liability on the First Amendment claim may be reviewed effectively on appeal from final judgment as was stated by the Court in Swint. Therefore, the order denying appellants' motion for summary judgment on Shinault's First Amendment claim is not an appealable collateral order.

## SUMMARY TO APPELLANTS' BRIEF

Appellee requests that this Court sustain the trial court's order insofar as it upheld his First Amendment claim and denied the claim of qualified immunity by appellant Skinner.